The attitude of the Colonial Office to the working of responsible government 1854-1868.

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THE ATTITUDE OF THE COLONIAL OFFICE TO THE WORKING OF RESPONSIBLE GOVERNMENT 1854-1868

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ABBREVIATIONS

The following abbreviations have been used:-

P.P. H.C.	for Parliamentary Papers presented to the House of Commons.
C.H.R.	for Canadian Historical Review.
C.H.B.E.	for Cambridge History of the British Empire.

Introduction

The history of the achievement of responsible government has been thoroughly explored both from the Imperial standpoint and the colonial. It was inevitable that the decade from 1845 to 1855 should receive such close attention, since the character of the future relations between the mother country and the colonies was determined by the adoption of the principle of self-government in internal affairs. Again, the constitutional development of those relations from the beginning to the Commonwealth of to-day has been traced by such writers as Sir Arthur Berriedale Keith and Professor Hancock, while the evolution of the colonial communities of the mid-nineteenth century into the nations of the twentieth has been treated by the historians of the colonies concerned. But no detailed study has been made of the attitude of the Imperial authorities to the working of the new system in its early years. Yet these years are second in importance only to those which cover the concession

of the principle of responsible government. When Imperial relations are based upon practical considerations rather than constitutional theory, the initial considerations and precedents exercise a deep influence upon later developments.

This thesis, then, is a study of the reaction of the members of the Colonial Office to the various problems which arose between 1854 and 1868 and bore, directly or indirectly, upon the constitutional relations of Great Britain with the responsibly-governed colonies. It is proposed to consider the constitutional significance of decisions upon such subjects as Imperial responsibility for defence and the commercial and fiscal rights of the colonists. Most of these problems have already been studied in detail, but in isolation.[1] The ground already covered in published works will not be retraced. But the material will be used to discover whether a relationship exists between developments in one colony and in others, and will be considered in the light of Colonial Office records where these have not been consulted.

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1. Professor C.P.Stacey's excellent Canada and the British Army, 1846-1871, which has the sub-title A Study in the Practice of Responsible Government, is an outstanding example.

At the same time, this thesis sets out to study the part played by the parliamentary and permanent members of the Colonial Office in making decisions, and to estimate the degree of influence which they exerted. This task has not been previously attempted. References have, indeed, been made to the opinions of members upon specific questions.[1] But there has been no analysis of their attitude corresponding to the picture of the Office given by Dr.Morrell in "British Colonial Policy in the Age of Peel and Russell."

There are several reasons for this ommission. Source material is practically limited to minutes upon official dispatches. It has been impossible to trace the private papers of the Secretary of State with the longest tenure of office, the fifth Duke of Newcastle, or of the two permanent under-secretaries, Herman Merivale and Sir Frederic Rogers.[2] The letters of Lord John Russell, Edward Cardwell and the fourth Earl of Carnarvon do not throw very much light upon colonial affairs in this period. The Governors dispatches tend to be formal and perfunctory, and it

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1. Notably in A.J.Harrop, England and the Maori Wars, and in W.M.Whitelaw, Canada and the Maritimes before Confederation.
2. Efforts have been made by Dr.Kerr, Miss M.Chappell and myself.

is not always realised that the minutes are not. They not only obviously represent the real views of the writers, but often give some idea of the nature of the private correspondence between the Office and the Governors. Communications between the Colonial Office and other departments also supplement the dispatches from the colonies.[1]

Again, there is no outstanding or controversial figure like Earl Grey among the later Secretaries of State, or Sir James Stephen among the permanent officials. Men who were eminent in other offices, such as Russell and Cardwell, or in other spheres of activity, such as Sir Edward Bulwer Lytton, left comparatively little mark upon colonial policy. Above all, once responsible government was established, the initiative passed from the Home Government to the colonies themselves. This is true of matters of Imperial interest as well as those of purely local concern. The one real exception is the withdrawal of military garrisons, which was an imperial policy imposed upon the colonies for Imperial reasons. In

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1. As a rule, the opinions of other departments are adequately represented in their letters to the Colonial Office, and I have consulted the records of the War Office, Foreign Office etc., only when they are not clear.

general the Colonial Office only made decisions in response to problems arising overseas. The questions which dominated social and political life - relations between French and English in Canada, between European and Maori in New Zealand, and between squatter, artisan and agriculturalist in Australia - were for the most part the province of colonial ministries and legislatures. The actions of the Colonial Office are consequently of less interest than the scene in the colonies, but they are of little less importance in the evolution of the system of responsible government.

Chapter I

The Outlook in 1854 and the Imperial Background.

I

In 1854 the Colonial Office recognised that responsible government must of necessity accompany representative institutions in the North American and Australian colonies. In that year it brought a period of struggle to an end by granting responsible government to New Zealand and Newfoundland. Now fourteen colonies stood theoretically equal in constitutional rights. But each, in fact, possessed a somewhat different degree of power, and faced different problems. These would influence the development of autonomy in each, but at the same time would affect the general conception of self-government.

In the preceding fifteen years also, each concession was made in response to local circumstances but had some significance for all the colonies. The period of struggle may be said to have opened with the publication of Lord Durham's report, with its advice that Canada should be governed in all local affairs by a ministry responsible to the colonial legislature.

The arbitrary, if intermittent, intervention of the Imperial power in these questions would end, and with it the exclusive hold of the loyalist "Family Compact" group upon patronage. This idea did not originate with Durham, but after 1839 reformers in Great Britain and in the colonies measured policies in the light of advance towards,or retreat from this feature of the report.

The fundamental step was taken in Canada.[1] The original objection of the Home Government was based upon the broad ground that a system of responsible Government was incompatible with colonial subordination. It was not realized that there could be a practical separation between matters of Imperial and of colonial interest. The position of a Governor responsible to two different authorities appeared impossible. If he received instructions from the Crown at variance with the advice of his minister, Lord John Russell pointed out that either allegiance to the Imperial government or responsibility to the legislature must be sacrificed.[2] It did not appear a remote dilemma, but inevitable if power should rest in the hands of the two groups tainted with disloyalty, the despised

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1. For the history of Canada,Nova Scotia & New Brunswick in these years, see CHBE.,Vol.IV,pp.335-367. W.P.M.Horrell,British Colonial Policy in the Age of Peel & Russell, pp.47-82, 447-71. W.P.M.Kennedy,Constitutional History of Canada,pp. 182-268

2. Kennedy, Documents of the Canadian Constitution,p.522.

French of the democratic party in Upper Canada.

Yet at the same time the Colonial Office recognised the vital need for bringing the executive and legislature into harmony. The surrender of the Crown's territorial revenues in exchange for a Civil list emphasised it by giving increased financial power to the Assembly. In consequence, Lord Sydenham broke the old monopoly of the Family Compact by appointing some reformers to the Executive Council, although he still excluded the French. He tried to divert attention from the modesty of his constitutional measures by a vigorous programme of practical reforms. His successor, Sir Charles Bagot, however, realised that any solution which ignored the French was bound to be unstable. He threw aside the policy of "assimilation", and resolved to give them the recognition and share of government to which their numbers and their unity entitled them. In September 1841 he established ministerial responsibility in practice by bringing Baldwin and Lafontaine into his Council in place of the Conservatives. The Colonial Office could not approve, although it hesitated to instruct Bagot to reverse his proceedings. But its real feelings were revealed in its whole-hearted support of the next Governor-General, Lord Metcalfe, in his determination to retain patronage and policy in his

own hands. He steadfastly refused to admit that groups in the Assembly were parties who might alternate in political power, and by implication condemned the French and radicals to the old attitude of perpetual opposition. But his efforts to secure a conservative victory in the elections of 1844 showed that even he recognised that the majority in the Assembly must be the dominant factor in Canada.

Constitutional deadlock might have ensued had Peel's government remained in office after 1846, and might have ended in separation. It had encouraged the Governors to act in concert with North American wishes wherever possible, but it was determined not to take the final step which would deprive them of control of internal policy. To save Imperial supremacy, all conciliatory measures must be of grace, not of right. But Lord Elgin, when appointed Governor-General of Canada, simply ignored the possibility that the Queen's sovereignty and the will of the Canadian Assembly could prove incompatible. With Lord Grey's concurrence, he announced before sailing that he would govern through, and according to the convictions of, whichever party had a majority in the Lower House.[1] In December 1847, when the reformers won the election, he accordingly appointed Baldwin and Lafontaine to his

1. Walrond, Letters of James 8th Earl of Elgin, page 36.

Council, caused the Conservatives to retire, and substituted a real neutrality for Metcalfe's presidency of the "Loyal" interest.

This constitutional step was significant enough. Unlike Bagot's measures, it was warmly supported by the Secretary of State. It was an acknowledgement that internal self government could co-exist with the supremacy of the Crown, and this must necessarily be valid for other colonies besides Canada.

Two years later Elgin demonstrated the extent to which government policy was to be the policy of the party in power by assenting to the Rebellion Losses Bill. It was, of course, still possible to interpret his attitude as a personal support of the liberal party, despite the principles professed by himself and Grey. The hostility of the family compact group and even the expectations of the liberals lent some colour to this view. In 1854, however, he accepted the conservative, Sir Alan Macnab, as joint leader of the Macnab-Morin Ministry, and the true relation of the Governor to the parties appeared clear and unmistakeable.

Although Elgin was regarded by subsequent responsible Governors as their prototype, in fact his position belonged to the old dispensation as much as to the new. The year 1854 marked a stage in the evolution of parliamentary government, because his

retirement removed his unique influence over Canadian ministers an influence which he himself summed up:

> "In Jamaica there was no responsible government, but I had not the power I have with my constitutional and changing cabinet." 1

His successor, Sir Edmund Head, could not hope to be able to make a similar claim. He was not a mere cypher, but after 1854 the ministers, not the Governor, were in appearance and in fact the arbiters of Canadian local affairs.

Canada not only led the way in constitutional example. She also showed how the new status increased her weight in demanding redress for grievances . A three years struggle for the repeal of the Imperial Act regulating the Clergy Reserves opened in 1850. Grey would have assented, but the Whig Government was not in a position to introduce a bill in 1851. Derby's ministry would not abandon its support of the Established Church, but Canadian persistence induced Newcastle to sponsor the repeal in 1853. The way was open for the colony to secularise the Reserves, although the interests of the present incumbents had to be preserved. The abolition of seigneurial tenures was scarcely less opposed to the ideas of the Imperial

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1. Walrond, op.cit., page 125.

Government, but this also was conceded in principle by 1854. The opening of negotiations for a treaty for the reciprocal free exchange of produce between Canada and the United States had a less obvious bearing upon self-government. It may be assumed that the Colonial Office did not intend the colony to indulge in differential duties, but expected her to repeal all duties upon similar produce from other sources. Again, as Dr.Masters points out, the treaty was ultimately concluded as a result of Lord Clarendon's desire to settle the fishery question between Great Britain and the United States.[1] But negotiations were begun in response to Elgin's account of the depression of 1848-9, and his insistence that so important a colony must be compensated for her loss of preference in Imperial markets.

Both the treaty and the abolition of anachronisms in land tenure were expected to help Canada to deal with the greatest problem confronting her in 1854 - the development of her agricultural and industrial resources and communications. That development depended heavily upon capital from abroad, and the necessity of furnishing part of the interest from provincial revenue led in time to fiscal measures which

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1. D.C.Masters, The Reciprocity Treaty of 1854, page 49.

could hardly be reconciled with the policy of the mother country. The Treaty, evidence of cordiality between Canada and the United States, for the moment obscured another difficulty. But relations between Great Britain and the States were in general too unstable for controversy over Imperial or colonial liability in Canada's defence to be long avoided. Nor were internal political problems absent. Elgin had, indeed, settled the most important aspect of the racial question. By accepting La Fontaine as his minister as fully and frankly as he did Baldwin, he had shown that the French were not to be in any way subordinate. They were to be recognised in practice as well as in theory as Fellow-subjects and equals of British Canadians . But the divergence of interests and institutions continued. Each race feared domination by the other, and was constantly watchful for any suspicious indications. All the early responsible governments tended to be unstable, since groups and factions took the place of well-defined parties in the legislatures. In Canada, the added complication of sectional feeling might bring deadlock, and even a complete breakdown of the new system.

Once responsible government was accepted as consistent with Imperial supremacy, it did not appear

an unsuitable form for Canada. But it was argued that Nova Scotia and New Brunswick were much too small to support a two-party system.[1] It was difficult enough to secure able Councillors, and so surely impossible to provide for an alternative administration. Imperial policy towards Canada was, however, reflected in these two Maritime communities. There was no question of racial feeling or of disloyalty, but in Nova Scotia there was acute resentment of the "conservative" monopoly of office. In 1837 the Legislative Council had been separated from the Executive, and the Lieutenant-Governor had been instructed to include some members of the Assembly in the latter. When Joseph Howe and two of his followers joined the Conservative Johnston in the Executive Council in 1840, it seemed as though the most forceful exponent of party government was prepared to acquiesce in a very moderate correspondence of feeling between executive and legislature. In New Brunswick also, the system appeared to have every prospect of success. A major grievance had been removed by the concession of the territorial revenues in 1837, and the Executive Council, although a body which met rarely and was not composed of heads of departments, was drawn from different sections of the province.

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1. See for example C.O.217/198 Harvey to Grey Private and Confidential 15 September 1846.

But Howe's experience in the Council of Nova Scotia between 1840 and 1843 convinced him more heartily that government according to the "well-understood wishes of the inhabitants" could only be achieved through ministerial responsibility. The Governor's power was increased when his advisers gave him differing councels, in accordance with the opinion of the section of the Assembly which they represented. Lieutenant-Governor Falkland paid little attention to the numbers in the Lower House, and in general followed conservative advice. The situation was in fact little different from the days of outright monopoly. After he resigned, therefore, Howe resumed his agitation with renewed vigour. In November 1846 the Secretary of State took the initiative, since he genuinely believed in the value of self-government for North America. Possibly he was also aware that where Howe lived parties, and consequently party government, was inevitable.[1] He ordered Harvey to accept the party system, to allow his Council to be composed of either conservatives or liberals, and to let influence and not authority be the means by which he should restrain unwise or extreme exercise of the powers of the Crown by the ministry.[2]

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1. C.H.R. Vol.VI, Chester Martin, Correspondence between CHarles Buller and Joseph Howe.
2. Kennedy, Documents, pp.570 ff.

This dispatch settled the matter, although it was not until Howe and the liberals came into office after a conservative defeat in the assembly in January 1848 that responsible government came into operation in Nova Scotia.

This dispatch was also the basis of a settlement in New Brunswick. In February 1848 the Lieutenant Governor, Sir Edmund Head, accepted a resolution in favour of responsible government. But the reformers were not closely organised as a party; their leaders were added to the Executive Council as individuals, and ministries bore the character of coalitions. The lack of unity in the Council and the difficulty of compelling attendance forced Head to appoint a Chief Justice in 1851 without its advice. This personal exercise of patronage, so inconsistent with normal responsible government, only resulted in the resignation of two councillors and a written protest by five others. Party organisation, however, was developing gradually. Shortly after Head's departure in 1854 the liberals secured a decisive victory at the polls, and for the first time a homogeneous ministry took office.

The larger Maritime provinces came to share almost automatically in Canada's constitutional advance, largely as a result of Grey's convictions and Howe's

prestige. But their size, and perhaps also the absence of any annexationist sentiment, did not allow their opinions to have the same weight as those of the larger colony. The Imperial Government paid little attention to Nova Scotia's opposition to the fishery provisions of the Reciprocity Treaty and there was no implied threat of an over-riding Act of Parliament in the warm recommendation that the Treaty should be retified by the legislatures.[1] In 1854 it was clear that the Home Government would not accord the fullest respect to Maritime autonomy if it conflicted with policies favoured by Great Britain and Canada. The two colonies could be confident that the Office would abstain from intervention only in matters of entirely domestic character. This description, however, applied to much the greater part of internal affairs, since in both colonies the concession of responsible government had done away with the only real political principle dividing parties, and intensely bitter personal rivalry for Honour and office took its place.

The argument that communities which were too small and too poor could not produce enough men of intelligence and leisure for a two party system applied with much greater force to Prince Edward Island and Newfoundland

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1. Masters, op.cit., pp.21-27, 89. C.O.188/122 Draft Grey to Manners-Sutton Confidential 21 September 1854.

than to the other Maritime provinces.[1] Moreover, they both had particular problems which made the Imperial government very reluctant for the concession. The Government of Prince Edward Island was not self-supporting, and had received an annual grant of £3000 from the Imperial Treasury since 1766. But the gravest difficulty arose from the perpetual feud between proprietors and tenants. The resident proprietors and the agents of the absentees monopolised the Executive and Legislative Councils. The Assembly, on the other hand, almost always represented the tenant interest, and sought to penalise the failure of the proprietors to improve, sell or lease their lands. The Colonial Office was firm in its support of the proprietary interest. It sanctioned a tax of four shillings upon every acre of undeveloped wild land, but this was the utmost licence allowed to the Assembly. In particular, the Office was adamant in opposing the principle of escheat. Lord Goderich pointed out that not only had the Crown condoned the proprietors' failure to fulfil the terms of the original grants, but the estates would escheat into the hands of the Crown, not

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1. Population in 1851: New Brunswick, 193,800; Nova Scotia, 276,117; Prince Edward Island, 62,728 (M.W.Innis, Economic History of Canada, p.177). Newfoundland in 1853: 120,000 (C.O.194/41 Hamilton to Newcastle No.86, 23 Feb. 1854. Encl.30 July 1833. Printed in P.P.H.C.1854-5, Vol.XXXVI (273) p.8.)

to the tenants.[1] The argument had no effect, and agitation for the remedy persisted. In consequence, the Home Government opposed a transfer of executive power which would place the proprietors at the mercy of the tenants, except for the last resort of the Imperial veto.

The struggle continued throughout the forties.[2] The island "family compact" or "Charlottetown clique" for once had a majority in the Lower House after the election of 1842, but found itself at issue with Lieutenant Governor Huntly, and from its own motives pressed for a closer dependence of the executive upon the Assembly. In consequence, it had to admit that some liberals should sit in the Executive Council after their victory in 1847. At first the liberals accepted four out of the nine seats, but they soon realised that a minority in a coalition could not secure responsible government, and resigned.

Against Elgin's advice, Grey advocated this system for the Island in December 1847, despite the failure in Canada and Nova Scotia. But he found that this time

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1. C.O.323/78 Wood and Rogers to Merivale 3 July 1855. Minute by Merivale 30 July 1855.

2. See W.R.Livingston, Responsible Government in Prince Edward Island.

the liberals would not compromise, and he inadvertently provided them with an almost irresistible weapon. In 1849 he declared that the Imperial contribution would come to an end, except for the Lieutenant Governor's salary. The Assembly promptly argued that if the colony was fit to provide a civil list, it was also fit for responsible government. Fortified by a further victory at the polls in 1850, the liberals refused to grant supplies, refused a minority of seats in the council once more, and again addressed the Queen and Parliament. It was obvious that there could be no pretence of governing the Island according to the "well understood wishes of the inhabitants" unless the Assembly's petition was granted.

It said much for the regard of Grey and Russell for colonial feeling that the interests of the proprietors did not prevent the concession in 1852. Consent was unwillingly given, and was, indeed, later regretted by the Colonial Office.[1] Fears that the Island's resources of talent were too small for a parliamentary system were not altogether unfounded. But much more important was the fact that tranquility was impossible until the land question was solved and absentee proprietorship abolished, and here the

1. See for example C.O.226/90 Daly to Lytton No.17, 30 March 1859. Minute by Blackwood 28 April 1859.

fault lay with the Imperial rather than the colonial government.

After 1851 the Newfoundland liberals argued tirelessly that if Prince Edward Island was fit for responsible government so were they. Here the bicameral form of representative government was less firmly rooted and had had a stormier history than in the rest of the North American colonies. It had been established in 1832 and immediately reflected the bitter conflict between the Catholic agricultural and Protestant mercantile interests. Riots and arson at the elections of 1836 and almost continuous deadlock between the two Houses led to a committee of enquiry of the House of Commons in 1840, and to the suspension of the constitution. Two years later a single-chambered legislature, partly nominated partly elected, was set up. A period of tranquility followed, but after the old constitution was restored in 1847 the Catholic party found leaders in their Bishop and in P.F.Little, and a political programme in the demand for responsible government. The Catholics were in a small minority of the whole population, but had a majority in the assembly.

Grey and Sir John Pakington both refused to grant self-government. They pleaded Newfoundland's size and poverty. But their real reason was reluctance to hand over the unwilling Protestants to a Catholic administration. In 1853 the Duke of Newcastle and Frederick Peel, his under-secretary, gave delegates from the Assembly a more sympathetic hearing. They urged that sectarian hostility had been greatly exaggerated in accounts given by Protestants, who enjoyed a disproportionately large share of the civil expenditure under the present system.[1] There was no real reason to anticipate oppression of either religion by the other. The Office did not believe that Governor Hamilton's advice should be given greater weight than this, since his opposition to responsible Government was obviously dictated by his own strongly Protestant feelings.[2] In March 1854 Newcastle announced that he would make the concession upon certain conditions. An overwhelming Catholic predominance must be avoided by doubling the number of the Assembly and subdividing

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1. P.P. H.C.1854-5, XXXVI (273) Page 96.

2. C.O.194/141 Hamilton to Newcastle No.89, 23 March 1854. Minutes by Peel 13 April 1854 and Newcastle 14 April 1854.

the present electoral districts to give the Protestants better representation. The revenue must be protected by making the constituencies pay the Candidate's expenses, not the colonial treasury.

These conditions caused one of the most bitter of the recurrent conflicts between the two houses of the Newfoundland legislature. Anxious to settle the question and believing the Council the more unreasonable of the two, the Colonial Office exerted its influence on behalf of the Assembly. Secretary Sir George Grey waived the second condition and was satisfied by the partial observation of the first, and enabled responsible government to be introduced in 1855.[1] But the good relations between the Assembly and the Imperial Government resulting from his action were menaced by a problem which was not considered during the discussions with the delegates. The French fishing rights hindered Newfoundland's prosperity and caused frequent disputes. The opening of negotiations between the French and British Governments in 1855 posed the question whether Imperial authorities would defer to the wishes of the self-governing colony by insisting upon its own interpretation of its rights;

1.C.O.194/141 Hamilton to Newcastle No.104, 14 June 1854. Minutes by Peel 9 July and Grey 7 Aug.1854. Draft Grey to Hamilton 8 Aug.1854. C.O.194/142 Hamilton to Grey No.124, 26 Oct.1854 Encl. Ibid. Hamilton to Grey No.127, 14 November 1854.

or whether the primary consideration would be a settlement with France.

Although, with this exception of Newfoundland, Lord Grey had been responsible for the inauguration of parliamentary Government in Canada and the Maritimes, he refused to establish it in the Australian colonies. In the first place, he believed that the North American colonies had undergone a necessary period of training in their long experience of representative institutions. Australia had not. New South Wales, indeed, had a Legislative Council in which two thirds of the members were elected, but this form dated only from 1842. The Legislative Councils of South Australia and Van Diemen's land were wholly nominated, although the majority of members were non-official. The Secretary of State by 1850 intended to assist their constitutional progress, and the Australian Colonies Government Act gave the New South Wales constitution to South Australia, Van Diemen's Land and Victoria, the colony made by separating the Port Philip district from New South Wales.[1] He had had to abandon his ideas of imposing federal institutions and a uniform tariff. In contrast to that compulsion, he now gave the colonies a very wide power of amendment. They might at any time

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1. 13 and 14 Vic. c.59. Morrell, op.cit., pp.342-386.

alter their form of legislature by reserved bill, and might introduce the bicameral system in imitation of the mother country and the more advanced colonies. But it was clear that he would not countenance the executive's dependence upon either the old Houses or the new. For even colonial experience would not overcome Grey's most important reason for withholding responsible government. Once it was granted, control of land policy must also be conceded, and this he was determined to prevent. He considered the waste lands of the Crown the property of the whole Empire, not of the individual colonies. Nothing could be done in North America, but it was the duty of the Imperial Government to enforce a policy in Australia which would safeguard the interests of future settlers.

Yet the demand for self government was centred upon the land question. Various colonies and classes agreed with certain features of the Imperial policy, based upon Grey's slightly modified interpretation of Wakefield's theories. But there was universal resentment of the British control of the most essential factor in Australian life. Imperial appropriation of a moiety of the land fund for immigration, and its regulation by the Land and Emigration Commissioners was equally obnoxious.

The absence of concessions upon land policy and revenue was the chief reason for the violent opposition of the New South Wales legislature to the Act of 1850. But it fell short of the Council's wishes in two other respects. The appropriation of the ordinary revenue was still denied to it to a considerable degree, since the civil list could only be altered by a reserved act. Patronage remained the prerogative of the Governor, or of the Imperial Government, as in the customs department. Grey, however, refused to admit the validity of these grievances, and a second remonstrance threatened to refuse supplies for 1854 if no redress were forthcoming.[1]

Herman Merivale was responsible for preventing a repetition of North American agitation in Australia, when he persuaded Pakington to hand over control of the waste lands.[2] The chief inducement was the great increase in the potential wealth and importance of the colonies caused by the discovery of gold in New South Wales and Victoria. It was also obvious that the enormous influx into the colonies made nonsense of any further attempt to balance land sales and immigration. Pakington

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1. A.C.V.Melbourne, Early Constitutional Development in Australia. New South Wales, 1788-1856, pp.379,389-91.

2. Ibid., p.398.

declared that he would make the concession, when the colonists had taken advantage of the amending clause of the Act of 1850 to set up elected assemblies and nominated legislative councils. But Newcastle made it clear that he would allow responsible government to be introduced, and would not insist upon nominated Upper Houses. Professor Melbourne has pointed out that ministerial responsibility and party government had not in reality been requested, although it was mentioned specifically once or twice.[1] The aim of the colonists was to make the executive dependent upon the legislature through the power of the purse. But the Colonial Office considered responsible government implicit in the colonists' demands.[2] Certainly New South Wales, Victoria, South Australia and Van Diemen's Land (now re-christened Tasmania) had no hesitation in providing for it in their new constitutions, and the system came into operation within the next three years.

The relinquishment of Imperial authority had solved only one aspect of the land question, while the large numbers of unsuccessful miners who intended

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1. Melbourne, op.cit., p.387.
2. C.O.201/467 Fitzroy to Newcastle No.165, 29 Dec.1853. Minute by Merivale, 21 June 1854.

to become settlers promised to intensify the struggle between the agricultural and pastoral interests. The conflict was bound to be most bitter in New South Wales and Victoria. In both, the old Councils ensured that it should have constitutional implications, since they had provided democratic assemblies combined with Upper Houses which would represent the squatting interests. Inter-colonial relationship, especially in the suddenly expanding field of commerce, was another problem which the transfer of power left the colonies to solve, since Grey's farsighted but premature plan for federation had been dropped. In Tasmania the Home Authorities still governed the affairs of convicts sent there before transportation had ended. Quarrels over their respective financial liabilities embittered the relations of the mother country and colony throughout the period. But evidence of difficulties such as these did not deter the Colonial Office from immediately acceding to the request of the newly-formed colony of Queensland for responsible government in 1859.

It is clear that the Colonial Office had not automatically granted responsible government to every colony of settlement, after the instance of Canada had shown it to be compatible with the Imperial tie.

It is true that agitation within the colony had been, as a rule, the deciding factor. But questions of internal size, internal problems and Imperial interests had been considered carefully. The concession was not made until the Secretary of State had decided that none of these questions ought to outweigh the colonial wish for self-government. The permanent members and the Liberal and Peelite parliamentary members of the Office had, therefore, in 1854 a real confidence that the system was the best one for the colonies where it operated.

But it was extended to New Zealand almost mechanically. At the end of the year, the discussion in the Office upon the request of the General Assembly was confined to criticism of the Acting Governor's haste in committing the Imperial Government without its consent, and to the need for compensating officers who would be displaced.[1] There was no opposition to the grant itself. There was no consideration of the effect it might have upon the native population, or upon the relations of the six provinces, with their elective councils and superintendents, to the central authority. It is true that these two problems had

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1. C.O.209/123 Wynyard to Newcastle No.48, 9 June 1854. Minutes by Elliot, 17 Oct, Peel 28 Oct. Grey 3 Nov. and Merivale 11 Nov.1854. C.O.209/124 Wynyard to Newcastle No 73, 10 Aug.1854. Minutes by Merivale 6 Dec, Peel 7 Dec. and Grey 7 Dec.1854.

been debated when representative government was conceded, and provisions regulating them made in the Act of 1852.[1] It had then, however, been assumed that the executive would be in the hands of a governor entirely responsible to the Colonial Office. The concession to a colony wholly inexperienced in self-governing institutions showed that the members of the Office now believed that, whatever difficulties as a North American or Australian colony might encounter, the colonists were best fitted to deal with them. This in turn seemed to promise that the members would not be inclined to intervene in the methods used by the new responsible governments. But the general views of the Imperial Government rested finally, not upon the members of the Office, but upon Parliament and British public opinion.

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> ".... The coincidence in time of the free trade question at home and the colonial question abroad....." [2]

was the reason given by Sir Charles Lucas for the

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1. Hansard, 3rd.series, Vol.CXXI, cols.105-137, 922-978. Vol.XXII, cols.42-1172.
2. A.Cornewall Lewis, The Government of Dependencies. Introduction by C.P.Lucas, p.XXXIII.

grant of responsible government. In the same way, the predominance of free trade theories directly and indirectly dictated the attitude of the Government when the extent of colonial autonomy was being gradually defined between 1854 and 1868. Free trade in mid-nineteenth century England meant much more than a fiscal policy. It implied a whole system of political economy. Englishmen did not fail to realise that their present properity was the result of their supremacy in manufactures. But at the same time they genuinely believed that free trade was the best system for the entire world.

The whole-hearted adoption of free trade appeared to destroy the <u>raison d'etre</u> of Imperial ties. This was not widely realised until the repeal of the Corn Laws in 1846. Two factors had somewhat obscured it. The idea that the colonies could relieve Great Britain of her surplus population in the distress of the twenties had been followed by the brief vogue of Wakefield's ideas of "systematic colonisation"; while the vigour and enthusiasm of the Colonial Reformers had prevented the colonies from being considered from an altogether commercial stand-point. In the second place, Huskissons' tariff reforms

had been based upon imperial preference, and he looked forward ultimately to free trade within the Empire.[1] Peel subscribed to this idea at the outset of his ministry, although it was clear that he intended preferences to be very moderate.[2] But this attitude developed into a full acceptance of free trade doctrines. After the repeal of the Corn Laws, it was obvious that no preference could endure for long when the Russell Ministry felt it mere justice to repeal the Navigation Acts in 1849, the "mercantilist" views of the commercial value of empire were finally shattered. Men of conservative modes of thought, who earlier would have opposed any lessening of colonial dependence, now felt that they had little interest in opposing the concession or development of responsible government. They joined those whom Bodelsen has so aptly described as "Separatists" and "Pessimists"[3] in questioning the advantage and permanence of Imperial bonds.

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1. Morrell, op.cit., pp.3,4.

2. Ibid., p.p.172, 173, 177.

3. C.A.Bodelsen, Studies in Mid-Victorian Imperialism, p.p. 42,43.

Compabatively few of the mid-Victorians, indeed, were Separatists, or desired and tried to promote separation. Most of these belonged to the Manchester School of radical free traders. Cobden, Bright and Goldwin Smith were its most able spokesmen. They believed that the first interest to be considered was that of the British consumer. The colonies were a positive burden. In particular, the expense of garrisoning them was a heavy imposition upon the British taxpayer, and prevented greater reductions of duty upon British imports. Canada, New Zealand and South Africa were the worst encumbrances, because of perpetual wars or danger of war. It was therefore, the duty of the Imperial Government to throw off the connexion and to insist upon their assuming independence. This did not apply with equal force to the non-self governing dependencies, but in the free trade world visualised by the Manchester School all colonial possessions were useless and out of date. The Separatists were sincere in using another kind of argument, but they did not pretend that it was equally important. The connexion hindered the development of the colonies themselves. Their conditions of subordination was foreign to the principles of "laisser faire", and endangered their political maturity, while Great Britain's foreign policy threatened their peace.

The Pessimists were a larger group, and included such men as Sir Frederick Rogers and Edward Cardwell. They did not eagerly look forward to the end of the connexion. But their ideas were largely based upon the example of the United States and the Spanish-American colonies. They believed that sooner or later the colonists would become impatient of their inferior status, and they could not visualise a relationship which did not involve subordination. Attributing much of the recurring hostility of the United States to the parting in anger, they emphasised that the inevitable separation must take place in a friendly spirit, and upon the initiative of the North American and Australian colonies. There must be no effort to retain them, but equally they must not be cast adrift against their will. The mother-country must foster their political and constitutional development, so that, when they wished it, they should be fit to stand alone.

Partly for this reason, the Pessimists followed the separatists in advocating colonial self-defence. Gladstone expressed the general belief when he declared:

> "... no community which is not primarily charged with the ordinary business of its own defence is really, or can be, in the full sense of the word, a free community."[1]

This view had the full support of Adderley, the only man of the time who really foresaw the shape of the future Commonwealth.[2] But the Pessimists were equally inspired by the determination to reduce the drain of colonial military expenditure upon the Imperial Exchequer. In this determination they were joined by all those who were indifferent to and ignorant of Colonial affairs, and also by most of those who believed that the connexion with the colonies would endure. The certainty that any proposal for reducing Imperial expenditure would be supported by the majority of the House of Commons was perhaps the most important result of Great Britain's adoption of free trade.

The Crimean war increased the desire for economy, by destroying Gladstone's hope of abolishing the income tax in 1859. Further, it had demonstrated the inadequacy of the military establishment to defend Great Britain's European interests while at the same time providing large garrisons for the colonies.

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1. P.P. H.C.1861, Vol.XIII (423) question 3381.
2. Professor Knaplund's argument in Gladstone and Britain's Imperial Policy that Gladstone was equally prescient does not appear to me convincing when applied to this period, although it is true with regard to his later life.

Thus the demand that the colonists should not only pay for their defence, but supply it in their own persons, grew more intense. Later, when the expectation of war with France in 1859, 1860 and 1861 had brought 160,000 Englishmen to enlist as volunteers,[1] the House felt itself even more fully justified in expecting the colonists to exert themselves.

The advocates of colonial self defence were far from satisfied with the progress made in the intervening years. In addition, the administrative confusion revealed by the Crimean War gave rise to a tendency to require evidence of efficiency and consistency from the War and Colonial Departments upon colonial defence. But that evidence did not appear to be forthcoming; a complete absence of order and uniformity seemed to exist. Between 1854 and 1857; for example, Victoria was paying the whole cost of the ten companies stationed there, whereas New South Wales was only paying for two out of six.[2] New Zealand was paying nothing at all, despite the efforts of the Colonial Office. The militia or

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1. Spencer Walpole, The History of Twenty Five Years, Vol. 1, pp.319-21.
2. C.O.309/40 MacArthur to Labouchere 10 Dec.1856. Minute by Merivale. C.O.309/42 Barkly to Labouchere 10 June 1857.

volunteer strength in all three was negligible.[1] On the other hand, Canada had made considerable provision for a volunteer force in 1855 and 1856.[2] But the gradual reduction of Imperial troops, which Grey had initiated, had been reversed, When in 1856 Palmerston sent five regiments to meet the threat from the United States following the attempt to recruit volunteers for the Crimea.[3] In 1859 there were 37,883 Imperial troops stationed in the colonies, less than 3,000 fewer than in 1854, and the War Office proposed an an inter-departmental committee to try to secure some sort of uniformity in the treatment of the colonists.[4]

Echoing the feeling of Parliament, J.R.Godley of the War Office and G.E.Hamilton of the Treasury reported in favour of a system of colonial contribution at a uniform rate.[5] Each colony should decide how many troops it needed and what kind of defences. The Imperial Government, if

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1. M.G.Chapell,unpublished thesis: The Select Committee of 1861 on Colonial Miltary Expenditure and its antecedents, Chapter IV.
2. C.P.Stacey, Canada and the British Army, pp.92-94.
3. Ibid, p.99.
4. P.P. H.C.1861, Vol.XLII (286)Appendix No.1.
5. P.P. H.C.1860, Vol. XLI (282) pp. 2 ff.

requested and if able, would supply the troops. It would also bear half the entire cost of defence, provided that this was not greater than the maximum sum which it had previously determined to spend upon that colony. But T.F.Elliot dissented on behalf of the Colonial Office.[1] He pointed out that a colony's contributions must necessarily depend chiefly upon its material resources. In the Commons, Adderley declared that this simply meant that the old methods and the consequent confusion would continue.[2] The dissatisfaction of himself and his followers forced Palmerston to agree to the appointment of the Select Committee on Colonial Military Expenditure.

But in July 1861 the Committee was forced to admit that no principle of uniformity could be substituted for the Secretary of State's discretion in deciding the amount of Imperial assistance and of colonial payment.[3] The report was significant only because it stated categorically the principles which the Government had been trying to enforce. Great

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1. Ibid, pp.13,14.
2. Hansard, 3rd. series, Vol. CLVIII, cols.1831-1836. Vol.CLXI, col.1400.
3. P.P.H.C.1860, Vol. XLI (282).

Britain did not repudiate the obligation to defend the self-governing colonies from foreign aggression resulting from Imperial policy, and from warlike natives when, as in New Zealand and South Africa, native policy was under control of the Governor. But these self-governing colonies ought to be primarily responsible for their own defence, in both a military and a financial sense.

Parliament's support of this thesis was underlined by two events of the sixties, the Maori war and the American Civil War. It steadily criticised the reinforcement of New Zealand, which resulted in the Imperial garrison being increased from 1,368 in 1860 to 10,000 odd in 1864.[1] Canada's vigour in arranging for calling out the militia and increasing the number of volunteers during the Trent crisis prevented opposition to raising the Imperial force in North America from 3,000 odd to 18,000.[2] But the rejection of the Militia Bill by the Provincial Legislature in 1862 produced a sharp reaction. Censure degenerated into unrestrained abuse of the colony.[3] It did not produce a sudden or drastic withdrawal, since Canada stood in considerable danger

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1. See Chapter V below.
2. Stacey, op.cit., pp.122-3.
3. Ibid, pp.140-142.

in the years following 1863. This was the outcome in part of enterprises against the union carried out by confederate sympathisers on Canadian soil, in part of union hostility to Great Britain, where support of the South had been indiscreetly vocal.

But in 1865 only 8,200 British troops remained in Canada, and the Imperial Government refused to guarantee a loan for building defences.[1] It was clear that the Cabinet and Parliament interpreted Colonel Jervois' report of 1863 to mean that the frontier was indefensible.[2] The Imperial authorities intended to concentrate the North American garrison at Halifax and Quebec, where they undertook to construct fortifications. Their object appeared to be the safeguarding of Imperial troops from defeat, rather than the protection of the province from invasion. The acute danger of invasion by Fenian forces in 1866 once again saw the trend of British policy arrested, and Canada was furnished with a force of 11,923.[3] She now paid for accomodation for the additional troops, and the strength of her volunteer force rose to 33,750 men.[4]

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1. Ibid, pp. 154- 169.
2. Hansard, 3rd.series, Vol.CLXXVI cols.373-78, 382. Gladstone Papers No. 44,753 Memorandum on Canadian Defence
3. Stacey, op.cit., pp.189, 192-3, 197.
4. Ibid., p.196.

But in 1868 Great Britain expended £937,000 upon Canadian defence, compared with £206,264 in 1861, and had over 7,000 soldiers stationed in the colony compared with 2,220 in 1861.[1]

Although Imperial policy had, for the time being, failed in Canada, it had succeeded in New Zealand, where only one regiment remained, and that was under sentence of recall, and in Australia where New South Wales and Victoria contributed £40 a year for each man of their very small detachments. Moreover, it was obvious that the setback in Canada must be temporary. In December 1868 Gladstone became Prime Minister, pledged to a policy of economy. He had been one of the most steady opponents of colonial garrisons, and had genuinely convinced himself that they damaged the interests of the colonies as much as the mother country. Cardwell, who encouraged North American confederation in the interests of self-defence and insisted that New Zealand should hold to the "self-reliant policy", became War Minister, intent upon the reorganisation of the army. Even more important was Great Britain's ever-sharpening consciousness of the danger to herself in dispersing her military forces. Strong enough after the

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1. Ibid., p.202. M.A.Chappell, unpublished thesis, Appendix.

Crimean war, it grew more intense when she was consumed with suspicion of Napoleon III after 1858, and again during the Schleswig-Holstein question of 1863-64 and the Austro-Prussian war of 1866. It accounted for, if it did not justify, the tone of ministers, Parliament and press towards Canada and New Zealand during the sixties.

This attitude of the mother country, which greatly strained her relations with Canada and almost brought those with New Zealand to breaking point, was virtually unanimous. Carnarvon, indeed, opposed the over-drastic withdrawals from Canada and New Zealand, and when in office showed some sympathy for the colonists' claim for protection.[1] But he acquiesced in the situation. So, also, did Russell, despite his later defence of Canada.[2] Palmerston did not share the view that money spent upon defence was "barren expenditure", But Gladstone's opposition would not allow him to carry out his full plans for home defence, and the colonists derived no benefit from his premiership.

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1. Hansard, 3rd.series, Vol. CXCIX, cols.193-213, Vol.CCIII, cols. 703 ff.
2. Ibid., Vol. CII, cols. 451 ff.

The general ideas of government economy and "laisser-faire" extended beyond colonial military expenditure. The reluctance of every ministry to assist the development of the self governing colonies by guaranteeing loans is significant. It is true that Parliament never rejected a loan bill. But when guarantees were proposed for Canada in 1867, for New Zealand in 1856 and 1863, and Prince Edward Island, even the ministers responsible openly disapproved of the principles.[1] Every other speaker agreed, and further expressed anxiety that the Imperial Treasury might be called upon to make good its guarantee.

The prevalence of the free trade conception of political economy was particularly important between 1854 and 1868, since the instability of governments prevented any practical challenge to it. Although the Peelites as a separate group disappeared before 1860, and Disraeli had done much to reorganise the Conservatives, a two-party system did not really function before 1868. Palmerston's electoral victories were largely personal. Members were returned to support him on a particular issue, as

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1. Hansard, 3rd.series, Vol.CXLVI, col.851: Vol.CL, col.384: Vol. CLXXV, cols.781-88, cols.1690-1697, Vol.CLXXVI, cols.1471-1516., Vol.CLXVIII, cols.736-764, Vol.CXCI, cols. 1963-2000.

in 1857. He could not rely upon the groups of Whigs, Liberals and Radicals to endorse any positive measure of colonial policy which he might wish to introduce. The Derby-Disraeli ministries of 1858-9 and 1866-8 were minority governments. There is no evidence that Disraeli desired to carry out any of the ideas on responsibly-governed colonies which he expounded in 1872,[1] but it is certain that any attempt would have failed. Moreover, when the leading statesmen tried to secure unity, the subject was generally Parliamentary Reform. In retrospect, it appears an academic question, but both parties continually contemplated reform bills. Disagreements even upon minor details were both fundamental and frequent.[2] No minister would endager a unity won with great difficulty upon reform for the sake of a colonial measure.

The lack of interest in Colonial affairs unconnected with defence is also partly explained by the succession of events abroad. Politicians were absorbed in the political as well as the military aspects of the Crimean War, the Indian Mutiny, the War with China, hostility towards France, Italian unity, the American Civil War and the Schleswig

1. G.E.Buckle, Life of Disraeli, Vol. V, pp.194-5.
2. See for example Ibid, Vol. IV, pp.178-182, 184-191, 193-199.

Holstein question. European affairs in particular were still much more familiar and interesting ground than colonial.

The attitude of the mother country naturally gave rise to grave colonial discontent.[1] But it possessed one merit from the colonial standpoint. It almost completely prevented Parliamentary discussion of, or intervention in, the affairs of the responsibly-governed colonies, other than defence. If the scrutiny of Westminster had been closer, or if the majority of members had not possessed a vague belief that self-government must be encouraged if self-defence were to be accomplished, it is unlikely that the tariff policies of Canada and Victoria would have been opposed only in retrospect. By far the greater number of decisions were left to the executive. While the members of the Colonial Office were not always far sighted or sympathetic, they were conversant with the views of the colonists, and less obsessed by commercial standards than the members of the Imperial legislature.

Chapter II

The Colonial Office 1854 - 1868.

In 1854 the Colonial Office was still regarded with some suspicion as the department of "Mr.Mother Country" which Charles Buller had portrayed a generation earlier. Now, as then, lack of Parliamentary interest in colonial affairs conjured up a picture of irresponsible officials exercising arbitrary powers. The less intimate connexion between the responsibly-governed colonies and the Office had not mellowed George Higinbotham's views of it in 1869:

> ".....the million and a half Englishmen who inhabit these colonies, and who during the last fifteen years have believed they possessed self government, have really been governed during the whole of that time by a person named Rogers. He is the Chief Clerk in the Colonial Office...." 1

He also repeated the accusation of dilatoriness:

> "The Colonial Office will consider (your grievances) until you and half a dozen sets of your successors have gone "the way to dusty death" politically."

He was always violent in his opinions, and on this occasion his arithmetic was weak. But Governor Bowen's

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1. E.Morris, Memoir of George Higinbotham, p.183. cp. C.Buller, Responsible Government, (ed.Wrong) pp.137 ff. and A.Patchett - Maritime, Life & Letters of Viscount Sherbrooke, Vol. 1, p.257.

constant warnings of the colonists' dislike of "Downing Street"[1] showed that Higinbotham was not speaking for himself alone.

In fact, at this time, almost every dispatch passed through the hands of the Parliamentary Under-Secretary and the Secretary of State, and, as we shall see, their inspection was very far from mere formality. They also had more time to give to colonial affairs since the separation of the Colonial and War departments in June 1854. The charge of dilatoriness was even less well founded. Sometimes, indeed, questions had to wait far too long for decision. This was most often the result of oversights by the Parliamentary members. But the most prolonged delays were the fault of the Treasury,[2] or, occasionally, one of the other departments to which questions were referred. Although both Ball and Carnarvon were critical,[3] dispatches and letters were in general minuted within a few days of their arrival, and the conduct of business was at least reasonably efficient. The senior clerks - Arthur Blackwood in the North American department, and Gordon Gairdner until 1860, and Charles Cox in the Australian department - could be relied upon

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1. G.F.Bowen, 30 years of Colonial Government, p.199.
2. C.O.209/177 Peel to Rogers, 16 July 1863. Minute by Rogers. 22 Oct.
   C.O.188/128 Arbuthnot to Merivale 14 August 1856. Minute by Merivale.
3. Hughenden Papers, Carnarvon to Disraeli, Private, 9th Oct.1866.

to provide the Secretaries with the information needed for decisions, and they did not hesitate to express their opinions. In Blackwood's case, these were based upon nearly 30 years experience in the Office.

In contrast, Herman Merivale, the Permanent Under-Secretary in 1854, had entered official life only seven years earlier. Called to the bar in 1832, he had evidently become restless, for he applied for the Regius Chair of Modern History at Oxford to both Melbourne and Peel.[1] But his appointment to the Colonial Office was not inappropriate. His lectures on Colonisation and Colonies, while Professor of Political Economy at Oxford in 1839-1841, revealed him as a very able thinker upon colonial affairs. Professor Frankel said:

> "He realised his generation was witnessing the birth of yet another world economy.... he did not like others fail to view the colonial expansion of his time as part of a vast process of change, based upon the release of the powerful forces of industrial and scientific discovery." [2]

But Merivale did not only perceive the general. He made a shrewd analysis of the particular problems of settlement and settlers. He pointed out for instance the fallacies of Wakefield's belief that the principles of systematic colonisation could be

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1. Peel Papers 40510 f.361. Merivale to Peel December 1842.
2. S.H.Frankel, Concepts of Colonisation, pp.2-3.

universally applied.[1] In the economic sphere he opposed regulations or other fetters, which might curb the "energy and enterprise" of the individual settler bent upon developing his land.[2] Wherever it was possible, he used the individual to illustrate such themes as the effects upon the mother-country's wealth of the withdrawal of capital by emmigrants, or the value of convict labour to a new community. In the political sphere, he favoured self-government, and even contemplated a time when the Crown should be the only link between Great Britain and her colonies.[3]

These ideas guided him when in Office. Control of waste lands was an essential preliminary to responsible Government in Australia, but it is probable that his distrust of economic regulation by a distant authority was equally important in prompting his advice to Pakington in 1853.[4] After 1854, however, he was concerned with the political and constitutional aspect of affairs, rather than the economic. Here, with a few exceptions[5], he steadily counselled acquiescence in colonial demands. Further, he opposed any statement of abstract constitutional principles

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1. Merivale, Lectures on Colonisation and Colonies. pp.261-3.
2. Ibid, p.264.
3. Merivale, op.cit., p.29.
4. See above, p.21.
5. See below, p.290, for example.

which might arouse conflict. The Office could not, for example, admit that colonial ministers had the right to see all correspondence between the Governor and Secretary of State, even upon local matters, since Imperial interests might be indirectly involved. But Merivale was determined to avoid making a categorical declaration to this effect.[1] By making a practice of the utmost frankness, the Governor ought to be able to convince his Council that they virtually enjoyed the right, and to prevent the question from arising. Merivale was critical of the working of responsible government in the colonies themselves, but in 1861 he was satisfied with the results of Colonial Office policy upon Imperial relations:

> "...the extraordinary rapidity of its beneficial effects it is scarcely possible to exaggerate.....the cessation as if by magic of the old irritant sores between the colony and the mother is the first result....confidence and affection ....seem to supersede at once distrust and hostility." 2

At the same time he did not now believe that the "confidence and affection" would form a permanent Imperial bond.[3] This change of opinion places him

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1. See C.O.188/131 Manners-Sutton to Stanley No.27, 17 Apl.1858. Minute by Merivale 7 May 1858. Ibid. Private & Confidential, 17 Apl.1858. Minute by Merivale 7 Oct.1858.
2. Merivale, op.cit., p.675. (Appendix, 1861.)
3. Ibid., p.677.

among the pessimists. But it was a tentative pessimism, and somewhat different from that of most of his contemporaries. He did not believe that the colonies were steadily, although perhaps unconsciously, progressing towards a certain point in their development at which they would realise their national identity and declare their independence. He thought rather that some dispute with Great Britain, possibly quite unimportant in itself, would suddenly make a colony feel the connexion irksome.

He differed in other ways from the majority of pessimists. Like them, he supported the idea of colonial self defence, but he was less opposed to giving Imperial military aid to responsibly governed colonies, particularly New Zealand. Expenditure was not barren if it ensured a rapid economic development, in contrast to the slow expansion of the thirteen colonies under the threat of physical danger.[1] Apart from this, he was not an ardent enthusiast for the policy of reducing the garrisons, simply because it could not be a consistent policy. In an emergency, as he knew from experience, at this time the Secretary of State would not refuse assistance. The colonists also knew it, and it prevented them from making provision in real earnest. Merivale was equally

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1. Merivale, op.cit., p.515.

impatient with vacillation over colonial contributions. He was much too conscious of the differeng circumstances of the dependencies to wish for uniformity, such as the War Office sought. But he wished the Imperial government to pursue a steadfast policy towards each colony. The Australian colonies should bear a large share, since they were wealthy and they were in reality protected from foreign aggression by the British navy. A relatively small sum might be exacted from New Zealand, but instead of Labouchere's and Stanley's vague threat of withdrawal if she did not pay, a definite date should be named for the embarkation of soldiers, and if necessary that embarkation should take place.[1]

Nothing could produce more mutual irritation between colonies and mother country than the petty disputes which arose from the present uncertainty. But Merivale also found inconsistency repugnant to his logical mind. He knew that compromise, moderation and expedience must guide him in most constitutional and semi-constitutional questions. But, upon occasion, his clear perception of consequences made him impatient of positions which were only tenable for the time being. Alone in the Office, he was prepared

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1.C.O.209/145 Gore Brown to Labouchere No.14, 25 Feb.1858. Minute by Merivale 18 May 1858.

for local ministers instead of the Governor alone, to recommend colonists for Imperial honours.[1] He was convinced that a dual system of Government could not endure in New Zealand, and this quality of mind would not allow him to seek for ways in which its operation might be improved in the meantime. Similarly, he presented a masterly analysis of possible alternative policies for the Government to the Select Committee on Colonial Military Expenditure, but would not indicate which he thought best, nor, rejecting uniformity in colonial military contributions, would he suggest any other principle.[2]

Sometimes, therefore, his opinions were too advanced to be followed by his colleagues. Sometimes, especially upon North American questions, he would point out alternatives to the Secretary of State without his usual clear expression of his views. Here it is difficult to detect his influences. But Labouchere's frequent requests to speak to him upon important subjects, and Lytton's obvious respect for his judgement[3] suggests that Carnarvon's picture of him held good throughout his tenure of office:

> ".....how completely the affairs of the office have been in his hands and how steadily and safely he has guided them.."[4]

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1. C.O. 217/216 Le Marchant to Labouchere No 124, 5 Dec 1855. Minute by Merivale 10 Dec 1856
2. P.P.H.C. 1861, Vol XIII (423) pp. 219-240.
3. Charles Merivale (Dean of Ely), Autobiography and Letters, (ed. J.A. Merivale) p.47, note.
4. A. Hardinge, Life of the 4th Early of Carnarvon, p.113.

Yet Merivale did not make an impression upon the public life of his generation, or even upon the Office, in keeping with his great ability. The reason probably lay in his temperament. Although he could upon occasion show an insight into the feelings of the colonists, he had little understanding of the general outlook of his readers.[1] In consequence, apart from his Lectures, many topical articles failed to rouse any considerable interest. Perhaps more important, as early as his Oxford days it was clear that he acquired knowledge too easily to avoid having an over wide and indiscriminate range of interests.[2] He lacked the power of "blind concentration". In 1874 it was remarked that he was "ready, prompt and vigorous, --- but rather careless... than painstaking."[3] Lytton declared that he was content to write well, whereas "he ought to have been contented with nothing less than writing <u>wonderfully</u> well". It has been suggested that he decided to go to the India Office in 1860 because, as a life-long Whig, he preferred to work under Sir Charles Wood rather than under the ex-Peelite, Newcastle.[4] But the move, taken with his

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1. C.Merivale, op.cit., p.419.
2. Ibid, p.47.
3. Pall Mall Gazette, 9 February 1874.
4. Edinburgh Review, 1884, Vol. CLX, p563.

earlier changes of career, suggests that he was always anxious to try new spheres of activity. If his energies had been concentrated in few channels he would probably have attained greater eminence, and his brother would not have had to lament that his "extraordinary powers have been so thrown away."[1]

When he succeeded Merivale, Sir Frederic Rogers had had fourteen years experience in the Colonial Office as Legal Adviser and Land and Emigration Commissioner. Like Gladstone, his early political convictions were Tory in the extreme,[2] but mellowed gradually into Liberalism. His letters from Italy as a young man reveal him as intelligent and observant but unable really to appreciate the Italian and Roman Catholic point of view. But he was capable of sudden deep feeling, as when he wrote that the misereres of the Sistine Chapel "struck me like a wild singing of birds."[3] In official life this side of his character appeared in his attitude towards native people. He was, for instance, almost haunted by a report from Queensland that the aborigines were being destroyed by ~~the~~ wells poisoning with strychnine.[4] In 1854 his sarcastic

1. C.Merivale, op.cit., p.419.
2. G.E.Marindin, Letters of Lord Blachford, p.17.
3. Ibid, p.96.
4. C.O. 234/13 Bowen to Cardwell No 80, 16 Dec. 1865. Minute by Rogers (undated).

remarks upon the Australian constitution acts indicate little approval of the principle of self-government.[1] But his awareness of the outlooke and feelings of the colonists had developed by 1860. Just as in Merivale's time, something more than mere expedience lay behind his reluctance to engage in conflicts with the settlers.

His pessimist sentiments[2] undoubtedly had a general influence upon his attitude towards the responsibly governed-colonies. But it is unlikely that they affected any particular measure. He was not a Separatist, and didnot look to colonial independence in the immediate future. His plan for defining responsible government by Act of Parliament[3] was designed to improve the existing organisation of the Empire, not as a preliminary to separation.

Rogers agreed with Merivale in avoiding public assertions of constitutional doctrines where the Imperial Government had no power to enforce them, particularly when the rights of the Governor were in question. But in other matters he was very willing to expound the principles which guided him. Imperial defence provided one example. In 1862 New Zealand

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1. Marindin, op.cit., p.157.
2. H.Taylor, Autobiography, Vol. II, p.237.
3. See below, p.280.

claimed that she should be exempt from payment towards operations against the Maoris, since native policy was controlled by the Imperial authority. Rogers was not content with declaring that control had in practice rested with the colonists. He explained that the right to demand colonial contributions was not dependent upon self-government.[1] If the Governor had acted in what he believed to be colonial interests the colonists ought to share the cost. It was immaterial whether he had acted wisely or foolishly, or whether he was responsible to the Imperial government or to the colonial legislature. A general argument of this kind supporting the particular gave Roger's advice much weight when one of the political members of the Office was undecided. Moreover, he was accustomed to make his own summary of events in important matters, and this helped to ensure that his superiors should share his views upon which points were most important.

But the exhaustiveness of his minutes was the outcome of a genuine desire to explore every question thoroughly, not merely of a desire to impose his

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1. C.O.209/155 Gore Brown to Newcastle No.100, 29 Sept.1860. Minute by Rogers.

wishes upon his colleagues. The sense of duty which would not allow him to advocate turning the responsibly-governed colonies adrift against their will, however, burdensome the connexion might be to the mother country, informed all his work. He had comparatively little to do with political affairs in North America, but he dealt with all legal ones and with every kind of business in Australia and New Zealand. It is clear that he had a wide knowledge and a real grasp of colonial conditions. Except in cases where he felt very strongly,[1] he was able to appreciate stand points widely different from those taken by the Colonial Office. Even when his comments were trenchant, his advice was usually moderate and practical. Taylor declared that he had not known a greater administrator in the Colonial Office than Rogers;[2] and qualities of penetration and sound sense justifying this verdict can be discerned amid the rather rambling and involved style of his minutes.

The only member of the Colonial Office to possess a gift for writing was Frederick Elliot, the assistant undersecretary from 1847 to 1868. He was capable of expressing more imaginative sympathy or more blistering sarcasm than any of his colleagues. Thus,

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1. Questions of territorial expansion, for example, or native policy or concerning the independence of the judiciary.
2. Taylor, op.cit., Vol. II, pp.158, 160-1.

in opposing the request of some Queensland settlers to be allowed to import Indian coolies without government supervision, he did not only refer to the "gross abuses and cruelties" which had earlier occurred.[1] He portrayed the misery of coolies "in the very capital of British India" who would "jump overboard and drown themselves in the Hoogly almost within sight of the Governor-General's house" to escape deportation. He could enter into the feelings of the South Australian settler "waiting for news of home and loved ones" who saw the mail steamer fail to call at Adelaide on its way to Sydney.[2] On the other hand, he met the demand of the Canadian House of Commons for a baronetcy for Galt with stinging comments upon "the spirit of ill-bred dictation".[3]

But most of Elliots' strictures concerned what he considered unwarrantable demands upon the Imperial exchequer. He was very much of his time in opposing guarenteed loans and imperial expansion,[4] although he had the rather more flexible attitude towards defence. He was most unbending over the Tasmanian convict department, and steadily supported the Treasury's resistance to the "exorbitant" claims made by the

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1. C.O.234/2 G.F.Leslie to Fortescue 2 July 1859.Minute by Elliot 7 July 1859.
2. C.O.13/102 Macdonnell to Newcastle, No 403, 25 July 1860. Minute by Elliot.
3. C.O.42/699 Monck to Buckingham No.84,22 May 1868. Minute by Elliot 11 June 1868.
4. C.O.201/485 Denison to Russell No.125, 16 Aug.1855. Minute by Elliot 8 December 1855.

colony in respect of convicts sent there before 1848. As early as 1855 he would have liked to hand over all convict affairs to the colonists after a final Imperial payment.[1] This had been done in New South Wales, but the sum demanded by Tasmania was large.[2] Elliot therefore, challenged the colony at every point in "the war against us". He contended, for instance, that the annual Imperial grant for police should cover the cost of recapturing prisoners: there should not be an extra charge.[3] He refused to admit that the colony ought not to be liable to pay for a re-convicted prisoner until six years, instead of the present one, had elapsed since his first discharge.[4] In his opinion the colonial government was

> "shabby, grasping and unjust, and it would not be profitable in us to give in for the sake of peace."

Yet the outstanding features of Elliot's attitude to the responsibly-governed colonies, especially in North America, was his anxiety to preserve good relations.

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1. C.O.280/316 Denison to Newcastle No.19, 13 February 1854. Minute by Elliot 5 July 1854.
2. C.O.280/351 Gore Brown to Newcastle 21 February 1862. Minute by Elliot 30 June 1863.
3. C.O.280/350 Young to Newcastle No.21, 19 Feb.1861. Minute by Elliot 7 May 1861.
4. C.O.280/62 Gore Brown to Cardwell No.25, 19 March 1864. Minute by Elliot 10 May 1864.

It was expressed more clearly and more urgently than Merivale's or Rogers' similar feeling. It was strong enough to overcome Elliot's dislike of North American confederation.[1] It accounted for his persistent criticism of Governor Macdonnell, whose quarrelsome nature threatened to cause a breach between himself and his ministers which might involve the home Government.[2] The Assistant Under-secretary had a particularly good understanding of Canadian sentiment, resulting from his visit to North America in 1837 as a member of Lord Gosford's mission.[3] But his concern for Imperial relations probably arose from his belief that separation could be and ought to be avoided. He declared:

> "The more united, flourishing and powerful that are the British provinces in North America, the more durable .... will be their connexion with the mother country". 4

This suggests that Elliot shared Adderley's idea that partnership might develop out of the existing dependence. But there is not enough evidence to disclose how far he had considered the question, or what

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1. See for example C.O.42/626 Head to Newcastle No.2, Jan.2,1861. Minute by Elliot 9 March 1861.
2. See for example C.O.13/91 MacDonald to Merivale Private, 1 April 1856 Minute by Elliot.
3. Taylor, op.cit., Vol. I, p.163.
4. Confidential Print, North America XL, 4 November 1858.

conclusion he ultimately reached.

Elliot lacked the intellectual attainments and legal training of Rogers and Merivale, but his political insight was equal to theirs. Nor was his character the least attractive of the three. Merivale, we are told, hid a kindly disposition beneath an abrupt and sarcastic manner.[1] Rogers' modesty and humour are revealed in his letters as well as in the opinions of his friends.[2] Taylor called Elliot "lively and engaging", and he appeared to retain these qualities. He was ready to censure severely, but equally ready to give generous praise,[3] while a Canadian gentleman, pressing a land claim, was much annoyed by the cold reception given him by the members of the Colonial Office "with the pleasing exception of Mr.Elliot".[4]

Four Secretaries of State held office in the fifteen months following the separation of the Colonial and War Departments in June 1854. Of these, Sir George Grey found himself in close agreement with the permanent officials over the responsibly-governed colonies.

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1. Pall Mall Gazette, 9 February 1874. Edinburgh Review, 1884, CLX, p.564.
2. See Roundell Palmer, Earl of Selborne, Memorials, Vol II, pp 1445.
3. See for example C.O.42/637 Monck to Newcastle No.68, 25 July 1863. Minute by Elliot 11 August.
4. C.O.42/613 Head to Secretary of State No.27, Encl.

He wrote at length only upon political matters involving cabinet decisions, such as the recruitment of volunteers for the Crimea in the United States.[1] But it is clear that he approved of the principle of self-government, since he madethe final concession to Newfoundland and New Zealand and would not allow the promises given by Newcastle to be curtailed by the Governor of Victoria.[2] Sidney Herbert made no impression in his very short period of office. Russell spent most of the weeks between May and July 1855 negotiating peace terms at Vienna, while Grey supervised the Office. Russell re-iterated the intention of the Government to make free trade a truly Imperial policy.[3] But both exercised most influence upon the future when they opposed making any statutory division between subjects of local and imperial interest.[4]

Sir William Molesworth had been one of the most uncompromising of the Colonial Reformers, but his death in November 1855 did not allow him to do much more than

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1. C.O.217/215 Draft Grey to Le Marchant, 16 Feb. 1855.

2. C.O.309/27 Hotham to Grey No.1, 25 October 1854. Minutes by Grey 8 February and Russell 4 May 1855.

3. See below, p.232.

4. See blow, p.264.

make some characteristic gestures, apart from his intervention in Prince Edward Island.[1] He upheld the policy of colonial self-defence, poured scorn upon the idea that the Imperial connexion could be strengthened by providing a guard of British troops for the Governor of Canada,[2] and, unknown to the officials, administered a sharp reprimand to Governor Hotham for being less than enthusiastic over the introduction of responsible government.[3] He was inevitably fettered by his official position, but there is little doubt that in a longer tenure he would have left the imprint of his narrow, vigorous personality upon the Office.

Following him Henry Labouchere appeared a somewhat colourless figure. "One of the purest and most virtuous of our political men",[4] his actions were characterised by extreme caution. He was earnest and conscientious, but reluctant to take the initiative. He was often anxious to delay or to take refuge in ambiguity.[5] He

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1. See below, p.291.
2. C.O.42/598 Head to Molesworth No.161, 7 Aug.1855. Minute by Molesworth 7 August 1855.
3. C.O.309/33 Hotham to Molesworth 19 June 1855. Draft Molesworth to Hotham 19 September 1855. C.O.309/35 Hotham to Molesworth No.155, 19 December 1855. Minutes by Merivale 25 March 1856 and Ball 27 March 1855.
4. Taylor, op.cit., Vol. II, p.148. Russell to Taylor 23 Nov.1855.
5. See for example C.O.309/35 Hotham to Molesworth No.143, 23 November 1855. Minute by Labouchere 3 April 1856. Marindin, op.cit., pp.173, 177.

relied a good deal upon Merivale but was quite ready to disregard advice if he himself could perceive a more non-committal course. One aspect of this tendency would have been applauded by Molesworth. Labouchere tried to dissociate the Home Government as far as possible from the internal affairs of the colonies, and he resolved at the outset to refrain from commenting upon the actions of Governors taken upon ministerial advice.[1] These were often trivial in themselves, but abstention helped to foster the tradition of non-interference.

Here Labouchere was not only evading responsibility. He approved of self-government, and did not consider that it must lead to separation, since he did not think that the mother country was absolved from the duty of protection.[2] Although he was willing to demand payment, he refused to depart from the earlier policy of defending New Zealand.[3] He could be clear enough upon specific points, but did not express any long views. Nevertheless, it seems probable that he visualised Imperial forces as a continuing link between Great Britian and the colonies.

He was succeeded in February 1858 by Lord Stanley, who impressed his opponents as well as his friends enough to make Cardwell suggest his return to the post in the Liberal administration of 1865.[4]

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1. C.O.13/93 Macdonnell to Labouchere 6 June 1856. Minute by Labouchere 27 September 1856.
2. Hansard, 3rd series, Vol. CX cols.646, 802.
3. See below, p.175.
4. Russell Papers. P.R.O.30/22/15 Cardwell to Russell 3 Nov.1865.

Earlier his contempt for the North American and Australian legislatures led him to put forward a plan for colonial representation in the House of Commons.[1] But now he was content to conform to the general attitude of the Colonial Office, and he gave his opinions clearly and crisply. His ideas were not, however, revealed by any important new issue arising in the responsibly governed colonies before he was appointed to the India Office upon Ellenborough's resignation in May 1858.

No Secretary of State entered office with more enthusiasm than Sir Edward Lytton. He was too impatient to wait for his re-election before beginning work,[2] and Godley wrote sarcastically of his "half mad" devotion to his duties.[3] But the flame soon died. He found routine uncongenial, and domestic troubles and illhealth overcame him.[4] He tried to resign in December 1858 and April 1859, causing Disraeli to remark dryly in January :

> "He expects to die before Easter, but if so, I have promised him a public funeral". 5

His stupid boast that if he were Governor he could settle the troubles of Prince Edward Island in three months seemed to indicate a complete failure to understand colonial problems.[6] His self-dramatisation tended to

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1. Hughenden Papers, Stanley to Disraeli, 13 March 1850.
2. Ibid., Lytton to Disraeli (undated).
3. W.Childe-Pemberton, Life of Lord Norton, p.172.
4. Earl of Lytton, Life of the first Lord Lytton, p. 286.
5. Buckle, op.cit., Vol. IV, p.192.
6. Hughenden Papers, Lytton to Disraeli, 14 December 1858.

obscure his shrewdness and very real interest in the colonies.

His confident conception of Empire was unusual, and he conformed to fewer of the prevailing doctrines that most of his contemporaries of either party. The Manchester School was anathema to him. He obviously wished to send generous help to New Zealand.[1] He did not shrink from the prospect of Imperial expenditure when, with what Professor Feiling calls his "rightness of judgement which sometimes climbs to predictive power",[2] he contemplated establishing a chain of British settlements across the North American continent.[3] But at the same time the deference to Canadian wishes which he provided for in this plan belonged to the mid-nineteenth century. Similarly his ideas for tightening the bonds between the mother country and colonies were by no means inapplicable to the responsible governments. He wished to inaugurate a new degree of courtesy and consideration in the Office towards colonial visitors,[4] and to ensure that the colonists received a fuller and less haphazard share in the distribution of honours.[5]

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1. C.O.201/145 Gore Brown to Stanley No.21, 26 June 1858. Minute by Lytton 23 Oct.1858. Lytton, however, approved of Disraeli's policy in South Africa.
2. K.Feiling, Studies in Nineteenth Century Biography, p.125.
3. C.O.42/615 Draft Lytton to Head, Confidential 20 Aug.1858.
4. C.O.226/90 Draft Lytton to Dundas, Confidential 7 Jan.1859.
5. C.O.43/127 Lytton to Governors, Circular 6 January 1859.

This idea appealed strongly to his successor the Duke of Newcastle, who also refused to countenance talk of an inevitable separation. But it is clear that he did not visualise a partnership. To him the strongest link was Great Britain's obligation to protect the colonies. While he agreed that the colonists ought to contribute largely to their military defence, he thought that the Imperial Government alone ought to provide naval protection.[1] He opposed any mention of Australian Federation which might create a power strong enough to dispense with Imperial assistance.[2]

Rogers had a poor opinion of his ability,[3] but he was possibly too much influenced by the memory of the disasters in the Crimea while Newcastle was Secretary of State for War. It is true that the Duke was certainly not in the front rank of statesmen. His mind was not original, but it was not rigid. He conceded responsible government to the Australian colonies and Newfoundland when Grey and Pakington had refused, and his transatlantic visit in 1861 and Watkin's influence combined to make him alter his views upon North American Federation. He acted foolishly upon occasion,[4] but

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1. C.O.309/58 Admiralty to C.O. 26 December 1861. Minute by Newcastle 26 December 1861.
2. C.O.309/63 Barkly to Newcastle No.42, 21 June 1863. Minute by Newcastle 26 August 1863.
3. Martindin, op.cit., p.225.
4. See below, p.241.

steady, conscientious work and moderate opinions characterised his tenure. For the most part he followed Rogers' advice, although he sometimes found it too liberal. It was not unimportant that a Colonial Secretary who held office in this period for four years should have an optimistic belief in responsible government.[1]

Cardwell was much more able, but less sympathetic and less benevolent. He was more sensitive to the feelings of Parliament than those of the colonies.

> "The constant presence of the House of Commons and the leader of the opposition in his mind are a terrible nuisance",

as Rogers complained.[2] This was the chief reason for his preoccupation with defence at this time. In the Cabinet he and Gladstone stood together in an unrelenting effort to reduce expenditure.[3] He did not appear to be particularly interested in military affairs as such, since he did not wish to go to the War Office in 1865.[4] The caution which made him defer to the Commons was also revealed in an ambiguity in the wording of his dispatches. But his attention was mainly directed to the two great questions of Confederation and defence which were decided

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1. When the permanent undersecretary remarked that to see a reflection of the British constitution in the Government of Victoria was like seeing the distorted reflection in the bowl of a spoon, Newcastle replied that he did not despair of it being beaten out into a tolerable likeness. (C.O.309/56 Barkly to Newcastle, Confidential 11 July 1861 Minutes by Rogers and Newcastle.

2. Marindin, op.cit., p.252.

3. Gladstone Papers, 44, 118.

4. Russell Papers, P.R.O. 30/22/15 Memorandum 14 Nov.1865.

in the Cabinet rather than in the Colonial Office. His belief that steps reflecting the growing strength and prosperity of the colonies could not be opposed, even if they tended towards independence,[1] led him to follow the permanent officials in the majority of other cases.

Lord Carnarvon probably wished to relax his predecessor's policy upon colonial defence in some slight degree, since he was very conscious of Imperial obligations. But this was impossible while Disraeli was Prime Minister or Chancellor of the Exchequer, except in the exceptional circumstances of the Fenian threat to Canada.[2] Like Newcastle, he felt that his rank involved service in government, but he was more ambitious of public appreciation. While under-secretary in 1858-9 he gave promise of ultimately achieving it. He was a little over-anxious, and his processes of thought were rather laborious and naive. He showed courage and decision during Lytton's frequent absences, however, and also a certain amount of insight into colonial feeling. But in his short Secretaryship, before he resigned upon the question of Parliamentary reforms, one or two fine speeches did not compensate for some clumsiness and inadequacy in dealing with confederation, which foreshadowed his later blunders in South Africa.[3] His intentions were always generous,

1. C.O.309/67 Darling to Cardwell, Confidential 23 July 1864. Minute by Cardwell 23 Oct.1864.
2. Hughenden Papers, Carnarvon to Disraeli 27 Aug. & 30 Aug.1866.
3. See below, pp.345-6.

but he lacked the power of consistently objective thought.

The Duke of Buckingham - "rough, hearty and full of work"[1] - was chiefly remarkable in office for his attention to detail. He persistently requested information which proved irrelevant to the decision in hand. His party's high opinion of him[2] was not entirely unjustified, but he had less understanding of the nature of responsible government than any other Secretary of State.[3] On the other hand, his attitude towards the withdrawal of the troops from New Zealand was less uncompromising than Adderley, his parliamentary under-secretary, approved, and so he did not arouse the degree of colonial resentment which his successor, Lord Granville, evoked. Moreover, in contemplating future Imperial expansion without dismay[4], Buckingham's ideas were in advance of those of his generation.

Of the Parliamentary Under-Secretaries between 1854 and 1868, John Ball was particularly conscientious in correlating information for the benefit of his chiefs. He did not hesitate to express his opinions, which were generally liberal and in favour of the development of autonomy. He was an ardent advocate of colonial self-defence. His influence in political questions was not, however, very great, and his most valuable work was done

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1. W.Childe-Pemberton, Life of Lord Norton, p. 206.
2. Hughenden Papers, Pakington to Disraeli 9 August 1852.
3. See below, pp.78, 152.
4. C.O.201/542 Young to Carnarvon No.51, 22 June 1867. Minute by Buckingham 3 Sept.1867.

in scientific and geographical matters such as the organisation of the Palliser expidition.[1]

Chichester Fortescue was a much more vigorous personality. Like Carnarvon, was very ambitious[2] and showed much more promise in subordinate office than he ever fulfilled in higher. Edward Lear admired his character and his ability,[3] and between 1859 and 1865 he did not display the hesitance and indecision of which his colleagues later complained. It is too much to say that he regretted the concession of responsible government. But he considered that the Imperial authorities had allowed the colonists too much latitude, and opposed any further increase in colonial independence. He was fully aware of the implications of self-government, and he demanded that the Office should try to increase its influence rather than its power. He quite frequently opposed Rogers in giving advice to Newcastle, and was successful often enough to make his tenure of considerable importance. But if he resented any claims to equality on the part of the colonies, he was generous and sympathetic when he could regard them as dependents. He considered

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1. H.Hall, The Colonial Office, p.52.
2. Russell Papers, P.R.O. 30/22/15 Wodehouse to Russell Nov.27 and Dec.12, 1865.
3. Letters of Edward Lear, Vol. 1, p.261.

Elliot far too harsh in his treatment of Tasmania upon the convict question,[1] and joined Rogers in his interest in the welfare of native peoples.

W.E.Forster had very little to say upon the affairs of responsibly-governed colonies. Curiously enough, this remark also applies to C.B.Adderley, despite his close contact with the affairs of the colonies. But it must be remembered that he was not particularly able, apart from his vision of future Imperial relations. He upheld the policy of colonial self-defence, since he considered that there could be no real harmony or partnership between the mother country and colonies while the element of dependence remained. But it was only in advocating that Canadian Privy Councillors should share the title of "Right Honourable" with the members of the Imperial Privy Council that he gave positive advice embodying his principles of equality.[2] The work of the last survivor of the Colonial Reformers was done in Parliament and in his pamphlets rather than in the Colonial Office.

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1. C.O.280/354 Gore Brown to Newcastle No.27, 21 Feb.1862.

2. C.O.42/663 Monck to Buckingham Confidential 2 August 1867. Minutes by Adderley 16 December 1867 and 15 June 1868.

Chapter 111

The Position of the Governor.

"The functions of the Governor... are very critical and peculiar", wrote Merivale in 1861; and the curious wording conveys a good impression of the perplexities involved in the office between 1854 and 1868.[1] He was pointing out the difficulty which the Queen's representative in a responsibly-governed Colony must find in reconciling his position as a subordinate officer of the Secretary of State and as a constitutional sovereign within the colony when colonial and Imperial interests happened to conflict. This difficulty had been one aspect of Russell's original objection to the concession of responsible government, and tended to resolve itself as the general broad harmony of Imperial and colonial interests appeared. Nevertheless, it could still confront the Governor with urgent problems, as the experiences of the Governors of New Zealand, for example, or of Lieutenant-Governor Gordon in New Brunswick clearly proved.[2] The responsibility of judging what were, and what were not, Imperial interests was not the least of these problems. In this respect, as in so many others, the events of the period contributed much towards defining the sphere of colonial self-government.

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1. Merivale, op.cit., Page 248.
2. See Chapter V and Chapter V111 below.

This chapter is, however, concerned with the attitude of the members of the Colonial Office towards the Governor's functions in local affairs. Here, indeed, the same kind of question was involved, since there was again something of a dual nature in his position. In general, he was the passive instrument of his ministers' policy but, like the sovereign, he possessed a reserve power most clearly seen in the exercise of the prerogative of dissolution. The chief problem lay in defining this power. It was not yet certain whether it should be considered analogous to the Queen's,[1] and, in the last analysis, only experience could show how far the colonists would acquiesce in its use. In performing his local duties, the Governor was comparatively free from Colonial Office interference,but he could never entirely divest himself of his character of an Imperial Officer. Consequently Colonial Office decisions between 1854 and 1868 were largely concerned with the extent of the Governor's discretion, and with the extent of his responsibility to the Imperial Government for the general administration of his office.

The members of the Colonial Office made no distinction between responsibly-governed colonies and others as far as the appointment of a Governor was concerned. It lay

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1. The actual nature of the royal power was not precisely defined in England,although it was generally assumed to be rather less than actual practice warranted.(Contd.over.....

undoubtedly in the hands of the Secretary of State. Even the practice of informal consultation with colonial governments before appointing was not established until the end of the nineteenth century.[1] It was not believed possible for the Imperial Government to share the responsibility of naming the Queen's Representative. On the one hand, the conception of colonial subordination was still too strong; on the other, the Home authorities naturally felt that the guardianship of Imperial interests was his most vital function. Adderley stood alone in the Office in questioning the policy of Imperial nomination. In 1854 he tentatively advocated conciliating the colonists by selecting one of themselves as governor.[2] Thirteen years later he remarked "we should be quite ready to let them choose their own Governors if they could get men who wished it".[3] These opinions resulted from his belief that common interests made the relations between the mother country and colonies those between partners. But it may be questionedwhether he would really have welcomed a colonial share in appointing governors before the Imperial garrisons were withdrawn.

In these circumstances, the choice of an administrator in the event of the death or absence of a Governor was a

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note 1 contd.from previous page --- Keith, Constitutional History of Modern Britain, p.484. Jennings, Cabinet Government, p.250.

1. Keith, op.cit., Vol.1, (1912) p.83-87.
2. Hansard, 3rd series, vol.cxxxv, col.1252.
3. C.O.280/372 Gore Brown to Carnarvon No.9, 9 Feb.1867. Minute by Adderley 22 April 1867.

matter of Colonial Office concern. Gairdner and Merivale, for example, considered that Sir Henry Young of Tasmania had weakly surrendered the Queen's prerogative of selecting her representative when he requested the Major-General commanding at Melbourne to take his place. Upon his refusal, Young gave up his leave, because his ministers objected to the deputy named in his commission. The Governor was only saved from a rebuke because Carnarvon kept his sense of proportion. He recognised that such incidents resulted from jealousy in small communities, and had no real constitutional significance.[1] The whole question of acting-Governors was indeed a difficult one in the self governing colonies. Where the officer commanding the troops held high enough rank he was considered the ideal choice, since he was an Imperial Officer, with, as a rule, a fair knowledge of local conditions. Elsewhere Merivale proposed that a dormant commission should be issued to some colonists of standing, and at length he persuaded Stanley to agree.[2] The plan combined direct imperial nomination with something of Adderley's hope of identifying the colonists with the mother country by honouring a private individual. But the Governor of South Australia appeared unable to find a suitable candidate, while the Governor of New South Wales reported that the suggestion only appealed

1. C.O.280/340 Young to Labouchere, Private 5 Mar.1853. Minute by Gairdner 4 May 1858. Ibid., Private 5 Mar.1853. Minute by Merivale 5 May. Ibid., No.29, 20 Mar.1858. Minutes by Merivale 23 June 1858, Carnarvon 24 June 1858 and Lytton 28 June 1858.

2. C.O.201/502 Denison to Labouchere No.8, 8 June 1858. Minute by Stanley 24 March 1858.

to those who looked forward to separation and the idea was abandoned.[1] In Queensland, Newcastle, in naming the President of the Legislative Council as administrator, insisted that he should be appointed by the Governor alone without the advice of his ministers.[2] This, however, was only possible because responsible government had been so recently introduced, and Sir George Bowen was an exceptionally forceful Governor. In colonies such as Prince Edward Island and South Australia, the Colonial Office had to be content with assuring itself that the acting Governor should not at the time be involved in party politics.[3] The Chief Justice was chosen, although the holders of that office were nominated by the ministers, and the principle that the person representing the sovereign must be appointed by the Imperial government had to be in part abandoned.

With regard to the Governors themselves, in all probability colonial interests benefited even more than Imperial from the character of the men appointed by the Home Government. By 1854 the Colonial Secretary had ceased to use his patronage for purely party purposes. He tended to choose from a group of semi-professional governors which had been growing up during the previous twenty years. It is true that Lord Malmesbury accused Newcastle of sending Sir Charles

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1. C.O.13/97 MacDonald to Stanley, Confidential 24 July 1858. C.O.201/503 Denison to Stanley, Private 9 July 1858.
2. C.O.234/1 Bowen to Newcastle No.22, Feb.17 1860. Minute by Rogers 30 May 1860. Draft Newcastle to Bowen No.16, 10 June 1860. C.O.234/2 Bowen to Newcastle 5 Sept.1860.
3. C.O.13/97 Macdonnell to Stanley, Confidential 24 July 1858. Minutes by Merivale 15 Oct.1859 and Newcastle 23 Oct.1859. Draft Newcastle to Macdonnell, Separate 6 December 1859.

Hotham to Victoria to "get him out of the way".[1] But it is possible that the somewhat unsuitable appointment was dictated by the belief that a particularly strong will was needed to deal with the trouble in the Victorian goldfields in 1854. In general, while political ties might determine the initial step for a man adopting a career in the Colonial service, advancement was largely the result of seniority and merit. Thus the Conservative Government of 1866 to 1868 promoted Bowen, who acknowledged the Duke of Newcastle as his first patron,[2] to New Zealand, and another Liberal, Sir John Young to Canada. Adderley, indeed, had some ground for suggesting that the Liberal party was less impartial,[3] but Cardwell showed that on occasion it could be equally disinterested. When the Governorship of Ceylon fell vacant, he administered a regretful snub to his ambitious friend, Arthur Gordon, who coveted the post. He told him "the power I hold is a public trust", and appointed Sir Hercules Robinson, whom he did not know personally, and so "did what was right by Ceylon and the profession".[4] The reluctance to admit colonists as candidates for office showed a certain disregard for colonial feelings.

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1. Malmesbury, Memoirs of an Ex-Minister, p.236. Malmesbury makes the rather unconvincing suggestion that Newcastle was jealous of the success of Hotham's diplomacy in South America, where he had been sent by the Conservatives.
2. C.O.234/3 Bowen to Newcastle No.19, 25 Mar.1861. Encl.Bowen to Gairdner Confidential 8 Oct.1860.
3. Hughendon Papers. Adderley to Disraeli.24 Jan.1871.
4. Cardwell Papers. P.R.O.48/6/40 Cardwell to Gordon Private October 14,1864.

But in one respect the Office was particularly careful of the welfare of local affairs in the self-governing colonies. It recognised the fundamental importance of selecting a Governor who would stand neutral between political parties. This was the reason for the recall of Governor Hamilton from Newfoundland, where he was closely identified with the Protestant interest, and for the unanimous Colonial Office disapproval of Sir Richard Macdonnell's constitution-making activities in South Australia.[1]

The Governor's colonial capacity was emphasised by the fact that his salary was voted by the Colonial legislature. Any bill altering it had to be reserved, since, as Rogers said "the decent support of Her Majesty's representative is a matter of Imperial concern." [2] Like the other members of the Office, the permanent Under-Secretary sympathised fully with the Governors' complaints of their inadequate payment. But he refused to regard any part of the civil lists as inalterable, a colonial pledge given in exchange for the surrender of Crown lands. The latter had been a matter of justice; the civil lists were established to ensure stable government. This view, together with colonial feeling that the disposal of revenue was one of the most essential features of self government, in practice reduced

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1. C.O.194/144 Hamilton to Grey No.150,14 Feb.1855. Draft Grey to Hamilton Private 16 March 1855. C.O.13/90 MacDonnell to Russell No.90, 22 Aug.1855. Minutes by Merivale 20 Nov.and Ball 5 December 1855. Draft Labouchere to MacDonnell 20 Dec.1855.
2. C.O.13/102 Maddonnell to Newcastle No.424,16 Oct.1861.Minutes by Rogers 10 Jan.1861. Draft Newcastle to MacDonnell No.12, 26 Jan.1861. C.O.280/352 Gore-Brown to Newcastle No.2,16 Dec. 1861. Minute by Rogers.18 Feb.1862.

the duties of the Colonial Office to the protection of vested interests. This was so far accepted by 1862 that, when a bill to reduce the salary of the Governor of Victoria was received, Cox was able to remark confidently that he imagined Newcastle would have assented if it had concerned future Governors only.[1]

Neither Rogers, Fortescue nor Newcastle, however, were prepared to place the Governor in the position of dependence upon the legislature which the Victorian bill involved. In drawing up the Constitutional Act the Legislative Council had placed the most important salaries in Schedule "D" and provided that they should not be altered except by a reserved bill passed by an absolute majority of both houses.[2] Now, while the emoluments of colonial officials were to remain under this protection, those of the Governor were to be deprived of it and to be made subject to the vote of a bare majority in the Legislature. The Governor could hardly fail to lose his character of independance and to become a mere cypher, since he would feel that his financial interests depended upon subservience to his ministers' views on all occasions. With much vigous Sir Henry Barkly urged this objection, and also the total unfitness of the new salary of £7,000 a year, instead of £10,000 and an allowance of £5,000. Conscious that the bill was inspired by personal hostility to him, he tendered his resignation in the hope that his successor would be treated more generously.[3]

1. C.O.309/60 Barkly to Newcastle No.52,22 May 1862.Minute by Cox 21 July 1862.
2. 18 and 19 Vic. cap.55. cl.60.
3. C.O.309/60 Barkly to Newcastle No.52,22 May 1862 and Separate 7 May 1861.

Rogers passed over the actual amount as a matter of colonial concern, but reiterated Barkly's point about the civil list and cited a further argument against sanctioning the bill, It fixed an arbitrary date for the reduction,yet the faith of the Crown was pledged to a Governor entering office in the expectation of certain payments. If they could be reduced during his administration, the colonists could force him to resign or the Imperial Government to recall him, which was nothing less than a direct interferance with the Sovereign's prerogative of choosing her representative. Barkly's resignation was refused and the bill disallowed upon these grounds. But this was the furthest point to which the Colonial Office would go in safeguarding the Governor's position. Newcastle agreed that he could not refuse assent to a bill applying to future Governors, provided their salary remained in schedule "B". All he could do, as he wrote in disgust, "will be to give them a man commensurate with their meaness."[1] A bill applying to Barkly's successors was passed in the following year, and duly confirmed.[2] Shortly afterwards the legislature of Nova Scotia in effect reduced the salary of subsequent Lieutenant-Governors by refusing to continue paying private secretaries. Although Elliot characteriesed it as a "mean proceeding" and Fortescue as a "wretched piece of ppularity

1. C.O.309/60 Barkly to Newcastle Separate 7 May1860.Note by Fortescue on Rogers' Draft. Newcastle to Barkly 26 July 1862. Ibid.,Barkly to Newcastle No.52,22 May 1862. Minutes by Rogers 23 July and Newcastle 25 July 1862.P.P.H.C1862,xxxv111 (308) p.8 and p.20.
2. C.O.309/64 Barkly to Newcastle No.74,Sept.4 1863.

hunting", the Victorian precedent was unhesitatingly followed.[1]

Buckingham, however, took a very different view. He held that the rate of the Governor's salary must be regarded as an Imperial affair. He felt that it was his responsibility to prevent both the good Government of a colony and the bonds between it and the mother country from being endangered by the appointment of a Governor who would deign to accept a meagre payment. The permanent officials and Adderley were quite ready to acquiesce in smaller emoluments to prospective Governors of Tasmania. But the Secretary of State refused his assent, even when it was pointed out to him that the cut was part of a general reduction of all salaries owing to the colony's financial straits.[2] It is possible that his authoritarian convictions might have led him to pursue the same policy towards Canada in the following year, despite the difference in importance between the two colonies. Elliot seemed to fear it, since he earnestly advocated a return to Newcastle's policy.[3] In fact, however, the bill had been passed against the wishes of the Canadian government, and the premier instructed Charles Tupper, then in England, to urge the Imperial Government not to confirm it. The Colonial Secretary,

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1. C.O.217/233 Doyle to Newcastle 10 Dec.1863. Minutes by Elliot 24 Dec.and Fortescue 28 Dec.1863.
2. C.O.280/372 Gore-Brown to Carnarvon No.99, 9 Feb.1867. Minutes by Dealtry, Cox,Adderley,Holland,Buckingham.
3. C.O.42/669 Monck to Buckingham No.85,23 May.1868. Minute by Elliot 12 June 1868.

therefore, merely reflected MacDonald's wishes and arguments in the dispatch he sent to the colony after it had been approved by the Cabinet.[1] Buckingham took up a position which it would have been difficult to sustain in the face of a serious determination in a large colony. Moreover, he did not succeed in making the appointment of the Governor subject once more to completely unfettered Imperial control. For, just as Sir Charles Darling was wont to say that he held office in Victoria because "the big wigs" all refused it, Lord Mayo declined the Governor-Generalship of Canada because of the controversy over the salary. [2] After 1862 the colonial legislatures had established at least an indirect and negative voice in the selection of their governors.

Once appointed, however, the Governor's influence in the day to day administration of his colony depended almost entirely upon his relations with his ministers. He had no executive power of his own: every action had to be performed with the co-operation of his executive council. His only weapons were his personality and reputation. When he had any plans for the welfare of the colony or of Imperial interests, they could only be carried out if he could persuade his advisers to adopt them. Here the

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1. Ibid., Draft Buckingham to Monck No.167, 30 July 1868.
   J.A.Pope, Memoirs of Sir John A.MacDonald, page 367.
   E.M.Saunders, (Ed.) Life and Letters of Sir Charles Tupper, Vol.1. MacDonald to Tupper 25 May 1868.
2. C.Gavan Duffy, My Life in Two Hemispheres, Vol.II, page
   Hughenden Papers. Buckingham to Disraeli 25 August 1868.

Colonial Office could only assist him with the most general advice and moral support. On the other hand, the ministers needed the Governor's co-operation in much of the procedure used to implement their policy, and this negative aspect of his power was of some concern to the office.

In the early years of responsible government, the Australian governors were naturally intent on discovering ways in which the formal meetings of the executive council could give them some active share in affairs, notwithstanding their exclusion from discussions between their ministers. Sir William Denison of New South Wales, for example, drew up an elaborate set of rules for the assembling of the council on one day each week, while Macdonnell felt his authority would be better shown if he summoned it whenever he wished. Barkly also thought his attendance in council important, although to a greater degree than the others he admitted "the unimportant and perfunctory character of business brought before the Governor-in-Council", and that "the action of the ministers is entirely independent of the Governor." [1] In this way the Governors asserted their right to learn at least part of their ministers' plans, to scrutinize documents, and when necessary to record protests, even if ineffectual. Above all, they hoped to impress

1. C.O.201/495 Denison to Labouchere No.149, 25 Sept.1856.
   C.O.201/502 Denison to Labouchere Confidential 26 March 1857.
   C.O.13/96 Macdonnell to Labouchere Separate 3 Nov.1857.
   C.O.309/45 Barkly to Labouchere Private and Confidential 8 May 1858.

upon their advisers that the government consisted of the Governor and council, not of the council alone.

The Colonial Office was willing to allow the Governors to try to maintain their influence through existing institutions, and it made no attempt to interfere with different arrangements. But it was a different matter when they virtually tried to create a new institution by altering the personnel of the Council. This unexpected development arose partly from the Australian Governors' activities, partly from the absence of the North American convention of ministers resigning both office and seat in the council upon defeat. In New South Wales and Victoria ministers held that they remained members of the council after they fell from power, although no longer entitled to attend meetings. [1] The Governors opposed this particular conception of the council, but it suggested to them a means of increasing their own influence. They both proposed that they should be authorised to retain individuals of 'Character and standing' as honorary members of the Council when their colleagues retired. [2] Barkly's dispatch was a little ambiguous: it was not plain whether he wished ex-ministers to remain in the Executive Council, or merely to keep their title of 'honourable'. What was very clear was that he and Denison wished the Governor himself to choose which members should be honoured, in order to encourage

1. C.O.201/495 Denison to Labouchere No.140,8 Sept.1856 and No.149,25 Sept.1856. C.O.309/42 Barkly to Labouchere Confidential 24 Jan.1857.
2. C.O.201/499 Denison to Labouchere No.118,28 Aug.1857.C.O.309/43 Barkly to Labouchere No.90,12Sept.1857.

ministers to strive for his approval.

Merivale was firmly opposed to every aspect of this effort to make the Executive Council a body analogous to the Privy Council in England, with the ministry as a working committee or cabinet. He thought it far too cumbersome a system for a small community. He felt, less reasonably, that there was a danger of ex-ministers insisting upon a right to give advice in times of political excitement. His consistent attitude to the Governor was revealed in his final objection. If he had power to nominate to a seat in the Council or even to give a mere title, it would cause him to 'govern too much', or, equally important, to appear to do so. He would seem the partisan of the faction which received most honours.[1] Ball and his successor, Fortescue, were inclined to sympathise with the Governors' hope of attracting the more eminent and wealthy colonists to political life.[2] But their opinions weighed little with Labouchere, who was as solicitous as Merivale for the Governor's neutrality.[3] Yet the views of Barkly and Denison were too greatly respected in the Office to be easily brushed aside, and finally the Secretary of State conceded to them the power of awarding the title. He emphasised, however, that it was not to be used unless the Council wished it.

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1. Minutes by Merivale on C.O.210/495 Denison to Labouchere No.149 (28 February 1857) and C.O.201/499 Denison to Labouchere No.118, 28 Aug.1857 (14 December 1857.)
2. C.O.201/495 Denison to Labouchere No.149. Minute by Ball 12 March 1857. C.O.201/499 Denison to Labouchere No.118. Minute by Fortescue, 16 December 1857.
3. Ibid. Minute by Labouchere. Draft Labouchere to Denison No.12, 11 Feb.1858.

No action was taken until 1859, when the Victorian legislature proposed to create a body to advise the Governor on non-political affairs such as appointments to the commission of the peace.[1] It should include judicial officers and the leaders of all parties. The motion, the result of an obviously unsuitable list of justices of the peace, was withdrawn, but Barkly felt it was 'worthy of grave consideration'. It was natural for him to embrace such a plan. The reaction against Governor Hotham's pretensions, followed by the long administration of the politically-inexperienced Major-General MacArthur, left the Governor of Victoria in the weakest position in Australia. Barkly believed that a 'privy council' would help him to resist unwise or even immoral advice from his ministers, whether it were composed as the assembly suggested or of ex-ministers chosen by himself. The prospect blinded him to the fact that he himself condemned the scheme when he asked for speedy instructions, in case the revulsion from extreme party government should not long endure.

To Merivale, the plan promised the development of the Executive Council in the 'worst form of all'[2]

> 'To let the Governor make his own Privy Council with positive powers of its own is to run directly counter to that jealous institution "responsible government".'

Newcastle also looked at the proposal in this broad

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1. C.O.309/48 Barkly to Lytton Confidential 21 January 1859.
2. C.O.309/48 Barkly to Lytton Confidential 14 January 1859. Minutes by Merivale 16 June and 2 December 1859.

constitutional sense as a 'measure to deprive the new form of government of its popular character.' [1] But Fortescue's opinion had gradually hardened in the opposite direction. He would welcome a privy council to 'be a check upon the excesses of the party men of the moment and to support the Governor's authority'. [2] He tried to meet Merivale's argument by urging that the Governor was too dependent upon his ministers to use this irresponsible body without their consent. It was a point of some weight, but it over-looked the possibility of the very existence of the 'privy council' affording the Governor enough moral support to allow him to defy his ministers and to precipitate a conflict with them and the Assembly. Once again it seems that respect for Barkly's wishes rather than for Fortescue's led the Secretary of State to authorise him to include 'certain permanent members of high official rank' in the Council. [3] In reality this would have been an extension of the custom still observed in Victoria and other colonies of appointing the officer in command of the troops as a member of the Council in case he should ever have to assume the government. The permission was given with such reluctance that Newcastle had refused to send the

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1. C.O.309/48 Barkly to Lytton Confidential 21 January 1859. Minute by Newcastle 24 October 1859.
2. Ibid. Minute by Fortescue 27 June 1859. C.O.309/48 Barkly to Lytton Confidential, Minute by Fortescue 2 Dec.1859.
3. Ibid. Draft Newcastle to Barkly, Confidential, 5 Dec.1859.

correspondence to the other Australian colonies, in case it should inspire them to follow Victoria's example. But, much to the relief of the Office, it was never used.

Between 1856 and 1859 the Colonial Office had thus assumed the rather curious position of defending the right of the colonists to exercise cabinet government in the simple form known in North America, not only against the advice of two of the most able governors in the service, but also against the apparent wishes of the colonial ministers and legislatures. It was not, perhaps, surprising that the inexperienced Fortescue or Barkly in his state of isolation should have failed to see that an irresponsible Council could assist the Governor only at the expense of self government. Victoria, however, was the last colony for such an experiment. The men of 'character and standing' would almost inevitably belong to the squatter class. Their interference in government would certainly not have been tolerated by the democratic assembly. A constitutional struggle must have ensued, and could only have resulted in leaving the Governor with less authority than before.

Newcastle and Merivale, with his belief that democracy could not be hindered, were far-sighted enough to realise the probable outcome. At the same time, their partial concession showed that they understood something of the Governor's wish for support.

Merivale later appeared to think that he would better

obtain that support through a more stable executive than through irresponsible advisers. In 1861, in an appendix to his 'Lectures' he suggested that it would be well if only one or two members of the 'cabinet' were departmental officers.[1] The rest should be 'ministers without portfolio' to conduct political affairs in the Legislature. The majority of departments should be in charge of subordinate permanent officials, who might have seats without votes in the legislature, and who would be more efficient and consistent. It may be conjectured that he also hoped that men at present too much occupied with private interests would serve in the Council if relieved of departmental duties. The plan was based upon current practice in Jamaica, which was to prove a failure,[2] although it might have been more successful in a fully responsible government. But Merivale, although his words were misleading, did not intend the new system to increase the power of the Governor or to make him in any way more independent of his Council. It was designed to check the evils consequent upon frequent changes of ministry and the exclusion of the propertied classes from public life. He had, however, made no attempt to recommend officially, still less to enforce, his idea upon the colonies.

Nor did the Colonial Office try to insist upon

1. Merivale, op.cit., page 651.
2. C.H.B.E., Vol.II, pp.711, 734-5.

absolute uniformity in the composition of the executive councils. Although New South Wales conformed to Imperial wishes, Victoria ultimately adopted the original plan of her own and New South Wales ministers.[1] The council came to consist of all ministers, while the advisers of the moment formed a 'cabinet'. This precedent was followed by the dominion of Canada in 1867. In 1860 the Chief Justice was added to the South Australian council, on the understanding that he would not take part in political discussion.[2] The Office rather doubtfully sanctioned a much greater deviation from normal practice in Prince Edward Island in 1859. Holders of office were excluded from the executive council and legislature, in an effort to meet the complaint that they formed too large a proportion of the small assembly.[3] Lytton told the Lieutenant-Governor that he should have tried to effect some compromise, but the experiment was allowed to continue. It was clear that by this time the Colonial Office required only one condition - that the Governor's sole advisers should be the ministry responsible to the Assembly.

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1. C.O.209/49 Barkly to Newcastle, Confidential 8 Dec.1859.
2. C.O.13/102 Macdonnell to Newcastle No.417, 24 Sept.1860.
3. C.O.226/90 Daly to Lytton No.18, 20 Mar.1859. Minute by Carnarvon 29 April 1859. No.20, April 15,1859. Minute by Lytton (undated). Draft Lytton to Daly No.9,12 May 1859. The experiment ended on 1864. It was found impossible to secure able men as Councillors unless they also received salaries as heads of department. See also Mackinnon, op.cit., page 98.

The Governor's right to disregard advice from this body on occasion was his chief source both of constitutional power and of danger. When he did so, the ministers would probably resign, and, his position would become intolerable unless he could secure a new ministry which could command a majority in the Assembly, either before or after a general election. If he were unsuccessful, the Home Government would have no alternative but to recall him. Hence it was essential for him to possess acute political judgement - an ability to guage whether he himself, rather than the ministry, was expressing public opinion, upon the particular issue. It was equally necessary for him to establish a reputation for impartiality, which in itself might influence the constituencies. But in every colony party feeling ran too intensely for the defeated to believe that he had not acted in their opponents' interest. He might be immediately justified, but if the slighted ministers returned to office in the future he would probably find that the mutual confidence so necessary for the smooth working of government had disappeared. He would lose his power to influence their policies, and might become subject to attacks such as Barkly sustained upon his salary. Behind these dangers lay another, much vaguer but not altogether negligible. If the Queen's Representative aroused hostility, colonial relations with the mother country might not escape its effects. In

consequence, it was natural that the permanent officials in the Colonial Office should show a tendency to discourage initiative on the part of the Governor.

His most important discretionary power was undoubtedly that of dissolution. It was expressly conveyed to him in constitution acts where legislatures were found on statute, and by Royal Instructions where they were established by letters patent. Keith has criticised Todd's treatment of the prerogative of dissolution as an example of the Governor acting as an Imperial Officer.[1] He points out that, except where the Governor refuses ministerial advice on grounds of imperial interest, he is, in fact, acting as head of the local government. As far as he owes responsibility, it is to the people of the colony. But in the early years of responsible government there was much practical justification for Todd's view. The Governors themselves were very conscious of their responsibility to the Secretary of State for their exercise of this prerogative. In the midst of a crisis, Lieutenant-Governor Manners-Sutton observed to Merivale in a private letter

> "I am very much aware that I am wholly responsible to the Crown for every step I have taken as representative of the Crown." 2

When he refused a dissolution to George Brown in 1858,

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1. Keith, op.cit.,(1912) Vol.1,pp.172-3. Todd, op.cit., p.558.
2. C.O.188/127 Manners-Sutton to Merivale (private) 13 June 1856, appended to Manners-Sutton to Labouchere No.23, 31 May 1856.

Sir Edmund Head informed Lytton of one important contributory reason, which he had not communicated to his ministers, and also emphasised his "duty to the Queen"[1]. Even Governors whose official dispatches were normally perfunctory reported the circumstances of every dissolution fully. Moreover, the Daily Atlas, in defending Head's refusal, commented

> "... it should not be forgotten that His Excellency has a responsibility to the Imperial Government as well as to us .... he could not have made out a case which would have satisfied the Imperial ministers." 2

At least when it suited them, many colonists thus shared the Governor's view.

How far was the Colonial Office prepared to accept a responsibility which might involve it in the odium, felt by one party for the Governor? In general, acquiesence was implied by the fact that specific statements of his duty were never repudiated. Upon the single occasion when the Governor's actual power to refuse a dissolution was challenged in a colony, Lieutenant-Governor Lord Mulgrave answered that his relations towards the Executive Council differed from those of the Queen towards the Cabinet.[3] He himself was responsible to the Home Government and must use his own judgement. It would be no excuse for him to say that he acted by the advice of

1. C.O.42/614 Head to Lytton, No.102, 9 August 1858.
2. C.O.42/614 Head to Lytton. Encl. cutting from the Daily Atlas, Toronto, 5 August 1858.
3. C.O.217/227 Mulgrave to Newcastle No.69, 23 June 1860.

his council. Since the point raised by the Nova Scotian ministers was important, we may assume that the members of the Office would have not passed over it in silence if Mulgrave's reply had not been satisfactory in every respect. But the degree of acceptance was dictated first by the views and temperament of the different members, and secondly by the conviction shared by them all that the Imperial Government must avoid appearing to side with either party in the colony.

Labouchere stands out as the one Secretary of State who refused to accept any responsibility. The case arising during his term of office was unusual - discretion was used to insist upon a dissolution. This course implied that the Governor had a policy of his own, in contrast to the more frequent refusals to dissolve. In May 1856 Manners-Sutton declared that a law prohibiting the sale of liquor in New Brunswick was inoperative and ought to be repealed, and that a general election must take place immediately to test the opinion of the constituencies upon it.[1] His ministers, who had sponsored the act, declined to advise a dissolution, and resigned. He secured a new ministry which duly gave the advice. The news reached the Colonial Office during the election. Hall was horrified at the Lieutenant Governor's rashness, and thought he had acted 'merely for the sake of getting rid a little sooner

1. C.O.188/127 Manners-Sutton to Labouchere, No.23,31 May 1856.

of advisers he disliked',[1] Manners-Sutton had not hitherto shown signs of the political acumen which distinguished his later governorship of Victoria, and Ball, sure of his defeat, wished to express disapproval to protect the Home Government from colonial wrath and to pave the way for recall. Labouchere, however, asserted quite frankly that nothing could be said about the propriety of the Governor's conduct until the result were known.[2] But even when the ministry was successful at the election, and the act was repealed by large majorities, the Secretary of State refused to give any positive sign whether he thought that the Lieutenant-Governor had acted properly or not.[3]

At first it seemed as though Lytton were going to take precisely the same attitude. Blackwood advised it when Head refused a dissolution to the Brown ministry which took office upon MacDonald's defeat in the legislature in 1858.[4] But a combination of circumstances forced further consideration of the refusal with other aspects of the Canadian crisis. MacDonald had been defeated over the Queen's choice of Ottawa for the new capital, and this

1. Ibid. Minute by Ball, 24 June 1856.
2. Ibid. Minute by Labouchere, 25 June 1856.
3. C.O.188/127 Manners-Sutton to Labouchere No.16, 30 July 1856. Draft Labouchere to Manners-Sutton 5 Sept.1858. The Colonial Secretary struck out the approval expressed in the original draft.
4. C.O.42/614. Head to Lytton No.102, 9 August 1858. Minutes by Lytton (undated) and Blackwood 30 August 1858.

attracted attention in England, although the Office wisely made a non-comittal and conciliatory comment.[1] Head's reference to confederation in his speech proroguing the assembly was a matter for the Cabinet, since it involved Imperial relations. Finally, the Times remarked unfavourably upon the Governor's imposing conditions upon the Brown ministry on assuming office, and his subsequent acquiescence in MacDonald's device of "double-shuffle". It appeared probable that the Secretary of State would have to defend him in Parliament, so in a private letter of 24 September Lytton asked him for fuller information about his personal actions during the crisis. Head was able to convince the Colonial Office that his decisions had been made on account of Imperial as well as Canadian welfare. He was anxious above all to secure the recognition of Ottawa as the seat of government, mainly for reasons of defence, and he knew that MacDonald's ministry was the one possible instrument.[5] So he approved Macdonald's resignation upon the issue, although he must have known that it was simply an adroit party manoeuvre. At the same time he was able to supply material for a defence of

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1. Times, 13 August 1858.
2. C.O.42/614 Head to Lytton 16 August 1858.
3. Times, 15 September 1858.
4. C.O.42/615 Head to Lytton No.120, 27 September 1858. Minute by Irving 22 October 1858 and note on it by Blackwood.
5. C.O.42/615 Head to Lytton Confidential 12 Nov.1858.
   C.O.42/617 Head to Merivale Private. "If the vote on the merits of government goes right I am quite satisfied .... I care only for this." See also C.H.R.,Vol.X,p.38, T.Beauchesne, The Choice of Ottawa as the Capital of Canada.

his actions in a constitutional sense. Charges of partisanship might be met by the absence of communication upon public affairs between himself and MacDonald's government after its resignation. Some of his reasons for considering an election unwise and unjustified might appear mere 'debating points'[1], but the most important was politically and constitutionally sound. It was obvious that the Ottawa question had produced a majority otherwise lacking any political principles in common, and that this superficial unity could not survive. There was no reason to suppose that MacDonald had lost the confidence of the Assembly upon general issues, or that the House had ceased to represent the constituencies. Upon the subject of conditions, Head declared this a misnomer. They were a statement of his opinion upon problems which Brown would face upon taking office and an indication of the basis of his own subsequent actions as Governor. But he had not insisted that the new ministers should promise to act in accordance with these opinions before he swore them in. Upon the "double-shuffle", Head admitted that he did not approve, but the device was legal, and he felt that it could be left to the Assembly to decide whether it ought or ought not to be condoned. Unlike dissolution, it was not a matter on which the Governor would be justified in exercising his discretion. Upon confederation, he pointed out that he had publicly

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1. C.H.B.E.,Vol. IV, p.346.

stated that any discussions must be initiated by the Imperial Government.

Lytton was ultimately quite satisfied that Head had acted with full attention to Imperial interests and without any intention of injuring the Conservative government in England. These considerations had given the prerogative of dissolution a new importance in the eyes of the Secretary of State, but long before the wider political aspects of the question were disposed of it was clear that he was going to modify his original intention of standing aloof from the constitutional issue. Quite apart from the Imperial interest in Ottawa, Head's reasons for refusing to dissolve appeared adequate to the members of the Office. They also thought he had refuted the accusations of partisanship successfully and naturally did not attempt to estimate whether he had been consciously or unconsciously influenced by his personal preference for MacDonald or prejudice against Brown. Once it appeared that the legislature was continuing to support MacDonald, Lytton told Head publicly that he had "acted in accordance with constitutional principles and exercised a sound judgement." [1] This approval was cautious and would not, of course, have been expressed if matters had

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1. C.O.42/614 Head to Lytton 16 August 1858. Draft Lytton to Head, 10 September 1858, based on notes by Lytton.

developed otherwise; here, Lytton and Carnarvon still agreed with Labouchere. Nevertheless, it provided a degree of moral support from the Office which helped Head to withstand the criticism still raging in the colony.

Newcastle followed the precedent a few years later, when disputes involving somewhat similar points arose in Nova Scotia. In February 1860 Mulgrave refused a dissolution to the Conservative leader Johnston, and the government resigned.[1] The Assembly, at its first meeting since its election the previous spring had defeated Johnston's proposal that the disputed elections of several opposition members should be tried by the whole house, instead of by committee according to custom. The ministry contended that the house had acted illegally, since the majority was secured by the votes of the doubtful members, and ought to be dissolved. The Lieutenant Governor's decision turned upon his judgement whether the Assembly had indeed acted illegally, or whether Johnston had lost the confidence of a properly constituted legislature. Already fortified by the opinion of the Imperial Law Officers,[2] he declared that the House itself, not the Governor, was the sole judge of the right of members to sit. Accordingly, he must

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1. C.O.217/226 Mulgrave to Newcastle No.15, 9 Feb.1860.

2. C.O.217/224 Mulgrave to Newcastle, Separate,6 Sept.1859.
   Draft Newcastle to Mulgrave No.34, 23.Sept.1859.
   Crown Law Officers' Report.

presume that any majority was quite legal, and that the Conservatives were in a minority. Then, like Head, he added general reasons to the particular, arguing that there was no reason to suppose that the Assembly no longer represented public opinion and that it was not in the interests of the community to be subjected to the upheaval of a general election. To this, as we saw, Johnston opposed the sweeping claim that the Governor did not, in fact, possess any discretion on the question of dissolution.[1] Meanwhile, Tupper, the driving force of the Conservative party, pursued Mulgrave with allegations of partisanship and unconstitutional behaviour in speeches, in the press and in letters to Newcastle and even to the Secretary of State for Foreign Affairs.[2]

The persistence and vindictiveness of these attacks did something to strengthen Mulgrave's decision to resign after succeeding to his father's peerage in 1863, although they were by no means fully justified.[3] The even balance of parties in Nova Scotia, indeed, enabled him to exercise a power normally outside the range of a Governor. He used the threat of the prerogative of dissolution to

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1. See below page.90.
2. See for example C.O.217/227 Mulgrave to Newcastle No.71, 26 June 1860. Encl.C.O.217/228 Mulgrave to Newcastle No.4, 10 Jan.1861. Encl. Ibid. Mulgrave to Newcastle 26 Dec.1861.
3. C.O.217/236 Normanby to Cardwell Private 9 April 1864.

compel acceptance of his views, but he undoubtedly applied it impartially to the two factions. He seemed to favour the liberals when he showed the legal opinion on which he intended to base his decision upon dissolution to their leader, Young, at the opening of the session.[1] He furnished a guide for successful liberal tactics, in order to prevent any violent or unparliamentary action, but he did not hesitate to impose conditions upon Young when taking office, much more clearly than Head did upon Brown. He insisted that Young must pledge himself to settle the disputed elections as soon as possible.[2] Later Mulgrave refused to prorogue the legislature until this had been done, and made the ministry abandon its intentions of doing so by a vote of the whole house, the very means it had condemned in its opponents.[3] In the following year he informed Howe, Young's successor that, like Manners-Sutton in New Brunswick, he would insist on a dissolution if the government lost any further support in the assembly.[4] Since the ministers acquiesced, his actions can only in the strictest sense be called unconstitutional.

In the Colonial Office, Fortescue was the last person to object to this attitude, described by Keith as that

1. C.O.217/226 Mulgrave to Newcastle Private and Confidential 26 January 1860.
2. Ibid. Mulgrave to Newcastle No.159, 9 Feb.1860.
3. Ibid. Mulgrave to Newcastle Separate 16 March 1860.
4. C.O.217/228 Mulgrave to Newcastle No.11, 8 Jan.1861.

' of a nobleman to petty colonial politicians'.[1] Apart from Sir George Bowen, Mulgrave perhaps approached nearest to fulfilling the Under-Secretary's conception of the functions of a Governor under the new system. His interest in the subject would not let him be content to applaud the Lieutenant Governor's skill in dealing with specific problems. He continually pointed out the wider issues involved. He agreed that Mulgrave acted rightly in 1859, in abiding by Johnston's advice, although doubting its wisdom, when he declined to summon an extra session of the assembly demanded by the newly-elected liberals.[2] But Fortescue stressed that this did not imply that the Governor was relinquishing the prerogative of summoning the legislature in opposition to the wishes of his Council. Again, in the crisis of 1860, when Mulgrave declared that he was not bound to accept the ministers' advice since they had lost the confidence of the legislature, Fortescue noted that he had the right to disregard the advice of a ministry supported by the assembly if he felt that the constituencies would uphold him.[3] Elliot, on the other hand, was much less than wholehearted in admiration of Mulgrave.[4] He was rarely concerned with this type of issue and had little

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1. Keith, op.cit., page 171
2. C.O.217/223 Mulgrave to Newcastle No.178, 28 July 1859. Minute by Fortescue 15 August 1859.
3. C.O.217/227 Mulgrave to Newcastle No.69, 22 June 1860. Marginal note by Fortescue.
4. Ibid. Minute by Elliot 11 July 1860.

knowledge of the situation. His one object was to prevent the Office from being drawn into giving an implied censure upon colonial statesmen, and he became pompous in urging the need for caution, which was already very well understood. He felt that, if Mulgrave had managed his relations with his ministers properly, there would have been no question of an appeal for the verdict of the Colonial Office.

But Newcastle, like his lieutenant, believed that the Office should 'give Lord Mulgrave from time to time the support of advice and approval.'[1] Advice was given privately, but approval was firmly conveyed in dispatches. Here there was no possible underlying political motive, since Imperial interests were not involved, and the parties in Nova Scotia were not at this time divided by any question of principle or policy, but only by ambition for office. It is true that the Home Government was drawn more deeply into the affair than was usual in a colonial crisis. Nova Scotia had a traditionally intimate connexion with England which made Johnston and Tupper address themselves to the Office, and in 1861 the Secretary of State visited Halifax, where he heard all the contestants and pronounced his

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1. C.O.217/226 Mulgrave to Newcastle Separate 16 March 1860. Minute by Newcastle 11 April 1860.

opinion personally.[1] Nevertheless, it is clear that Newcastle with Fortescue's warm concurrence, was ready both to pass judgement upon the constitutional propriety of the Governor's course and to encourage him to act as arbiter between parties.

On the other hand Newcastle did not demand that the Governor's discretion should be maintained in impossible circumstances. He made no protest when Gore Brown gave up the prerogative of proroguing the Legislature in 1861.[2] The Governor had announced that the Assembly must remain in session until the arrival of Sir George Grey. But when his Ministers declared that they would not attend the House or conduct business, he was forced to prorogue on the date chosen by them. Again the Secretary of State received sympathetically Barkly's confession of helplessness in Victoria. In June 1861 the Governor granted a dissolution to his advisers, largely because the alliance of the opposition groups against them was purely temporary and he felt that no stable administration could be formed from the present Assembly.[3] Although it specifically admitted the existence of the royal prerogative, the House protested against the dissolution. To shows its displeasure more forcibly, it inserted a clause in the Appropriation Bill forbidding supplied to

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1. C.O.217/227 Trollope to Newcastle No.83, Aug.17 1860. Minute by Newcastle 2 Dec.1860.
2. C.O.209/165 Gore Brown to Newcastle, No. 168, 5 Sept.1861.
3. C.O.309/56 Barkly to Newcastle No.56, June 24.1861. No.62, July 11.1861.

to be paid after 30th August, and thus made it essential for the Legislature to be summoned before that date. Barkly was very much alive to the fact that this was an invasion of the prerogative of summoning the legislature. But he could not bring himself to cause financial chaos by vetoing the Appropriation Bill. In the Colonial Office, Cox thought that he would have been justified in doing so. Rogers, however, decided that Barkly had had no choice, even though he could not agree with the Governor that there was any hope of preventing the incident from being drawn into a precedent.[1] Newcastle did what he could to sustain the hope by sending a forcible dispatch condemning the assembly's evasion of

> 'the principles of responsible government which are at least as essential to the liberties of the subject as to the prerogative of the sovereign.' [2]

But he felt that it would be unfair to Barkly to express disapproval, and stated openly that he did not think that he had had any alternative. Although he weakened the force of his censure of the assembly, he maintained his policy of supporting the Governor, and showed himself to be neither unreasonable nor unrealistic.

What part did Merivale play in the substitution of this attitude for that of Labouchere? He fully accepted the limit ations upon Colonial Office action, but he

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1. C.O.309/56 Barkly to Newcastle No.62, July 11.1861. Minutes by Cox 23 Sept. and Rogers 23 Sept.1861.
2. Ibid. Minute by Newcastle 24 Sept. 1861. Draft Newcastle to Barkly No.69, Oct.12.1861.

never hesitated to comment upon the constitutional aspects of each question. He stated firmly that Head's refusal was quite proper, taking the Queen's prerogative as an analogy.[1] He thought that Mulgrave did not stand 'on quite such firm ground' since the Johnston ministry had held office for two years in contrast to Brown's few days and so had a greater claim upon the Lieutenant-Governor's confidence.[2] Nevertheless he emphatically approved Mulgrave's refusal, feeling that a strong gubernatorial hand over dissolution was the best way of controlling factions in the smaller colonies. For the same reasons he supported Manners-Sutton, as soon as the latter removed the impression (given in a private letter) that he was ready to dissolve before he had secured a ministry to give the required advice and perform the necessary administrative duties.[3] Merivale made it clear that he thought approval should be given officially. It is true that he failed to move Labouchere, but his steady advocacy of this view, so much opposed to his usual wish to keep the Governor dependent upon his advisers, could hardly fail to carry weight.

Rogers also believed that the Governor ought to retain his discretion as long as possible and produced a

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1. C.O.42/614 Head to Lytton No.102, 9 August 1853. Minute by Merivale 27 August 1853.
2. C.O.217/225 Mulgrave to Newcastle No.15, 9 Feb.1860. Minute by Merivale 24.Feb.1860.
3. C.O.188/127 Manners-Sutton to Labouchere No.23, May 31.1856. Minute by Merivale 3 July 1856. Ibid. No.16, 30 July 1856 Minute by Merivale 27 August 1856.

reasoned defence of his view.[1] It was more necessary for him than for the Queen. If she should grant a dissolution contrary to constitutional usage, 'informed public opinion' would punish the ministry which advised her. In the absence of 'informed public opinion' in the colonies, the Governor was the guardian of such constitutional usages as might be adapted from the mother-country. It was his duty to preserve them, and to create others by laying down precedents for the granting and refusal of dissolution. Although Rogers had comparatively little to do with disputed dissolutions, his opinion must have fostered the tradition laid down by his predecessor. The point of the permanent Under-Secretaries' influence is not unimportant. The incidents during the period 1854 to 1868 did not, of course, establish the final extent of the Governor's discretion over summoning and dissolving the legislature. Controversies continued to arise for over fifty years. But it may be questioned whether the Governors would so long have retained their practical exercise of that discretion if Labouchere's policy of refraining from any Imperial comment upon their actions had been established.

A second discretionary power conveyed to the Governor in legal form concerned his action upon colonial bills. By commission, instructions and by statute he was authorised to assent to, to reserve or to veto bills

1. C.O.210/543 Belmore to Buckingham No.184, Dec.26.1868. Minute by Rogers 29 Mar.1869.

of the local legislatures, and no mention was made of the Executive Council. After 1854 the veto fell into almost complete disuse. Barkly exercised it in 1858 on account of technical faults in a bill, and Monck would have followed his example in Canada in 1863 if he or his Council had recognised similar disabilities in time.[1] The Governors had not completely abandoned the theory that it was their duty to with-hold assent to bills which they considered detrimental to the welfare of their colonies. Bowen characteristically upheld it in no uncertain terms, and Denison regretted that he had not vetoed the act of 1858 which established universal suffrage and lowered the tone of political life in New South Wales.[2] The theory was never put into practice. No member of the Office would have agreed with it, although Fortescue came nearest, believing that a Governor should use his discretion to reserve a bill of purely colonial interest which appeared to him unwise.[3]

In fact, the Governors with Imperial encouragement tended to reserve rather than veto doubtful bills. In 1857, for instance, Manners-Sutton asked what he should do if the legislature passed a bill introducing the principle of popular referendum.[4] He was instructed to

1. C.O.309/43 Barkly to Labouchere No. 119,4.Dec.1857. C.O.42/635 Monck to Newcastle No.171, 24 December 1862.
2. C.O.234/1 Bowen to Newcastle No.63,11 Aug.1860 C.O.201/517 Denison to Newcastle. Confidential. 18 Jan.1861.
3. C.O.234/1 Bowen to Newcastle No.63, 11 August 1860. Minute by Fortescue 13 November 1860.
4. C.O.114/29 Manners-Sutton to Labouchere. Confidential.28 Apl. 1857. Minute by Labouchere 27 May 1857.

assent to it if his Council advised it, provided the bill contained a clause suspending its operation until the Imperial Government's decision was recorded.[1] This marked the beginning of a consistent Colonial Office policy. It did not concern bills which the Governor considered contrary to the public good, but bills which involved some constitutional anomaly. Here even Labouchere was willing that the Office should relieve its representative from the unpopularity of giving a final decision.

The Governor was guided as a rule upon reservation by the clause in his Instructions commanding him to reserve for the significance of Her Majesty's pleasure six clauses of bills which impinged more or less upon Imperial interests,[2]. A further clause however, enabled him to assent if emergency warranted. It was often a difficult legal question whether any part of a bill brought it into one of the six categories, and the Governor based his action upon the advice of his Attorney General, invariably a political officer. But Bowen very effectively asserted the Governor's right to decide the matter for himself, when the Sydney branch of the Agra and Masterman bank failed in July 1866.[3]

Queensland had been drawing from it £50,000 a month for

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1. Ibid. Draft Labouchere to Manners-Sutton Confidential 3 June 1857. Until 1861 the Instructions did not provide for reservation in New Brunswick and suspending clauses were used instead.
2. These were bills containing provisions for divorce, differential duties, establishing proper currency as non-convertible legal tender, prejudcing the rights (contd.over)

public works. To meet the demands of an empty treasury and the threat of widespread unemployment, the government decided to bring in a bill establishing inconvertible notes as legal tender. Bowen made it clear that he would not assent, and that he would reserve the bill if it passed both houses. He refused to admit that the situation was urgent enough for him to use the discretionary clause in his instructions. The ministers resigned, ostensibly because the Governor had rejected their advice. In reality, as Bowen had shrewdly suspected, they knew their proposal was obnoxious to the legislature and their defeat inevitable. It was not difficult to find a new government. R.G.W.Herbert, who had been premier from the foundation of the colony until the previous May, took office again. When he had secured financial measures to relieve the crisis, he was able to sail for England; while, so far as the former ministers were concerned, Bowen wrote to Cox "There was a race among them as to who should run fastest into my arms." [1]

In London, Rogers, Adderley and Carnarvon "fully approved" Bowen's obedience to his instructions rather than

Note 2 from previous page ---- and property of non-residents or trade and shipping of the other parts of the Empire

3. C.O.234/15 Bowen to Cardwell No.43, 20 July 1866. Bowen to Cox Private 20 August 1866.

1. C.O.234/16 Bowen to Cardwell No.150, 18 Aug.1866 Bowen to Cox Private 27 Aug.1866.

to the advice of his ministers.[1] But this did not mean that the Office thought it essential for the governor to maintain his right to decide personally upon reservation. As early as 1854, indeed, Merivale was doubtful whether the Governor of Canada would be able to uphold the practice of reservation at all, and was willing for it to be abandoned. Bowen had acted with courage and decision, but, in spite of a riotous mob at Brisbane, the circumstances had been far more favourable to him than he would have admitted. He could justify his action upon Imperial grounds, since the proposed Queensland law was covered by the instructions to reserve bills establishing an inconvertible paper currency as legaltender and also bills affecting the rights and property of non-residents. But far more important, he had had a majority of the Assembly to support his policy. The attitude of the members of the Office towards a Canadian incident in the same year showed they were ready to allow a Governor to disregard his instructions when the legislature could not be expected to support him. Monck assented to an act establishing a paper currency convertible only at Quebec and Montreal.[2] The Imperial Treasury disapproved strongly, although the

1. C.O.234/15 Bowen to Cardwell No.43, 20 July 1866. Minute by Adderley 21 Sept.1866. Note by Rogers on draft Carnarvon to Bowen No.5, 26 Sept.1866.
2. C.O.42/656 Monck to Cardwell No.114, 15.Aug.1866 Minute by Elliot 2 Nov.1866, Rogers (undated), Carnarvon 8 Dec.1866. Draft Carnarvon to Monck No.116, 15 Dec.1866.

act did not contravene the instructions so directly as the Queensland bill. The Office, however, did not only support Monck's action, but decided to allow the act to remain in operation. Since Queensland was so much less powerful than Canada, the Office might well have disallowed the former's currency bill if it had passed the two houses and received Bowen's sanction. But it was clear that so long as the Imperial government retained the final weapon of disallowance, it would not insist upon the Governor taking independant action upon the reservation of bills.

Apart from the summoning proroguing and dissolution of the legislature and action upon colonial bills, the Governor was legally bound to perform all other duties with the advice of his Executive Council. His instructions empowered him to disregard that advice if he thought it necessary. While the regulations for his procedure on such occasions were treated as absolute common form, there was no doubt that the power remained, even in purely colonial matters. But it was doubtful how far that power extended, how far it was consistent with colonial self government, and how far the Colonial Office would either require or sanction its use.

It was not clear, for example, whether the Governor was always bound to accept his Council's advice upon

patronage, the most fruitful source of discontent under the old system, and of hostility between factions under the new. It was true that policy was seldom directly affected by the issue, but if his right to some discretion were acknowledged, he could help to give his colony an efficient and impartial administration. The opinions of the Governors themselves varied according to personality and local circumstances. Bowen was once more the extreme exponent of discretion. It was

'his undoubted right and duty ... to refuse his sanction to the employment ... of individuals of dubious character'.[1]

In contrast, Gore Brown announced from Tasmania in 1864 that he had been compelled to remove 'three highly respectable gentlemen' from the magistracy and to appoint another whom he considered unfit.[2]

In the Colonial Office there was a shade of difference between the attitude of Fortescue and his colleagues. Merivale expected Australian governors to control appointments completely.[3] Rogers would have been glad enough to see a Governor exercise a beneficial influence, but Bowen's pretensions made him uneasy. He wished to state that the Home Government could not support a Governor refusing to install an officer 'on the mere

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1. C.O.234/1 Bowen to Newcastle No.63, 11 Aug.1860. C.O. 234/11 Bowen to Cardwell No.64, 3 Dec.1864.
2. C.O.280/363 Gore Brown to Newcastle Separate and Confidential 20 May 1864.
3. C.O.210/494 Denison to Labouchere No.119, 22 July1856. Minute by Merivale.

ground.... of dubious character'.[1] Fortescue overruled the permanent Under-Secretary, and, being a firm supporter of Bowen, gave him public encouragement.[2] In 1864 he wished to rebuke Gore Brown for his weakness, but Cardwell agreed with the permanent officials in acquiescing in the supremacy of the Executive Council.[3] This was made even clearer in the following year, when the Secretary of State supported Elliot in laying down the principle that the Governor could not refuse the advice of his ministers even upon the appointment of the superintendent of an institution partly supported by Imperial funds.[4] Meanwhile, in 1862 Rogers set out to put the subject into formal order in North America, where royal warrants were still issued to some of the more senior officials. Since neither imperial nor provincial laws made it necessary, he decided to abolish the practice, in spite of the anxiety of some governors to continue it in the interest of the prestige of the higher office-holders.[5] His motive was partly to gain convenience and uniformity, but in part he was anxious to remove even the most nominal connexion between the Imperial Government and local appointments.

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1. C.O.234/1 Bowen to Newcastle No.63,11 Aug.1860. Minute by Rogers 4 Nov.1860.
2. Ibid. Minute by Fortescue Nov.1860. Draft Newcastle to Bowen No.42, 26 Nov.1860.
3. C.O.280/363 Gore Brown to Newcastle 20 May 1864.Minutesby Fortescue 26 July and Cardwell 6 Aug.1864.
4. C.O.280/366 Gore Brown to Cardwell No.8,28 Jan.1865. Minutes by Elliot 20 Apl.1865 and Cardwell 28 Apl.1865.
5. C.O.188/136 Gordon to Newcastle No.129,3 Mar.1862.Minute by Rogers. C.O.217/230 Mulgrave to Newcastle No.73,15 Aug.1862.

The nomination of judges, militia officers and Legislative Councillors provided a partial exception to this policy. All three had this in common - although essentially local, they might in some degree touch Imperial interests. As Rogers stated -

> 'The upright administration of justice..is not a matter of purely local interest. Foreigners, absentee proprietors, persons trading with the colony - the Imperial Government itself is interested in maintaining it.' 1

In the light of this opinion the Office might have been expected to encourage Governors to use their discretion to secure the best legal minds for judgeships. But these were everywhere looked upon as political prizes. This, in theory, proved the need for the Governor's intervention; in practice, it made it impossible. It was plain that any Executive Council containing an attorney-general who hoped to become Chief Justice would not tolerate a Governor's refusal to assent to its recommendation. Well aware of this, Merivale would concede only a qualified discretion to Sir Gaspard Le Marchant in Nova Scotia in 1856:

> 'He must be guided by the advice of his council as between the several claims of the candidates for office: subject only to this, that if he conscientiously regards the man selected as unfit by reason of absolute defects, not merely relative infirmity, he is then bound to prefer the public interest to every other consideration.' 3

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1. C.O.13/106 Macdonnell to Newcastle No.527, 25 Oct.1861. Minute by Rogers.
2. The root of Johnston's hostility to Mulgrave for instance, was not constitutional outrage, but the feeling that the Lieutenant Governor had deprived him of the chance of succeeding the dying Chief Justice by making it impossible for him to remain premier.
3. C.O.217/218 LeMarchant to Labouchere Confid.No.50, 5 May 1856. by Merivale.

In giving this positive advice, Merivale was making a distinction between appointments to the Bench and other nominations. He did not agree with Blackwood that in asking for it, Le Marchant was trying to transfer to the Imperial Government the odium which 'it is sometimes the duty of a Governor to bear.' [1]

But Rogers, eager as he was to foster the independence of the judiciary, felt that it would be a breach of responsible government if the Governor were advised to exercise discretion. He warned Bowen against carrying out his declared intention of refusing to accept any recommendation of Lutwyche as Chief Justice of Queensland.[2] He agreed that Barkly could not have declined to accept an active politician as a temporary judge in 1862, although he urged Newcastle to echo the Governor's misgivings in a dispatch.[3] He told Lieutenant Governor Gordon of New Brunswick that there was no difference between judicial and other appointments.[4] Gordon was so convinced that he could not resist his Council that he contemplated resigning rather than making appointments 'so frightfully mischievous to the community',[5] but when the time arrived he accepted his

1. C.O.217/218 LeMarchant to Labouchere Confidential No.59, 5 May 1856. Minute by Blackwood.
2. C.O.234/5 Bowen to Newcastle No.69,15 Nov.1861.Minute by Rogers.
3. C.O.209/59 Barkly to Newcastle No.26, 20 Feb.1862.Minute by Rogers 6 May 1862. Draft Newcastle to Barkly.No.24, 14 May 1862.
4. C.O.188/129 Gordon to Newcastle No.34,18 Aug.1862.Draft Newcastle to Gordon Separate 27 Dec.1862.
5. Gladstone Papers,Vol.ccxxiv Gordon to Gladstone,Private, Jan.1864.

minister's advice without demur. The Colonial Office gave him no encouragement to make an issue of the question by resignation, and treated his attitude as simply evidence of a lack of moral courage. It was clear that even Merivale's cautious position had been abandoned.

The Colonial Office had the support of the War Office in attempting to secure a greater independence for the Governor in the appointment of Militia and volunteer officers, who might at any time be called upon to co-operate with Imperial tropps. The actual strength of the colonial forces depended, of course, upon the legislatures. But nearly all the local acts placed their organization and discipline and the selection of officers in the hands of the Governor. In Canada, where the question was most important, both Head and Monck kept their powers firmly in their own hands, while working in harmony with their advisers. In New Zealand the subject was potentially scarcely less important, but a weaker Governor, Gore Brown, after a petty quarrel, thought it would be wiser to leave appointments in the hands of his ministers.[1] Merivale agreed, because he considered such a development inevitable.[2] He ruthlessly pointed out to Lytton and Carnarvon that the compromise

1. C.O.209/142 Gore Brown to Labouchere No.168, 29 Dec.1857.
2. Ibid. Minute by Merivale 29 April 1868.

they hoped for could not endure in face of the attitude of the Governor and Council. Since the War Office was curiously hesitant on this occasion, Gore Brown was told that, although the Imperial Government thought it would be in the interests of the colony if he were to retain the initiative, no ruling would be made and he might carry out his own wishes.[1]

But in 1861 both Elliot and Newcastle were ready to repudiate publicly the claim of the Prince Edward Island Ministers to have the same virtual control over militia as over civil affairs - a claim withdrawn almost as soon as made.[2] In the following year Barkly stirred the Imperial Government further by stressing the defects in the Victorian system. General control of the militia had passed to the colonial treasurer, and officers were elected by their men, a practice which the Home Government had already refused to countenance in New Brunswick.[3] Rogers and Newcastle supported the War Office demand that all Australian Governors should assume the position of a Lord Lieutenant in an English county.[4] He was commander in chief and

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1. C.O.209/149 Storks to Merivale 24 May 1858. Minutes by Merivale 10 Aug.1858, Carnarvon 27 May 1858, Lytton 5 and 12 August 1858. C.O.209/142 No.108 Draft Lytton to Gore Brown August 1858.
2. C.O.226/94 Dundas to Newcastle. Private and Confidential 7 Dec.1861. Minutes by Elliot and Newcastle.
3. C.O.309/59 Barkly to Newcastle No.12, 27 January 1862. C.O.188/137 Gordon to Newcastle 7 July 1862. C.O.188/130 Hawes to Merivale 4 March 1857.

responsible for every detail of regulation. But the Victorian ministers refused to make the change, and Governor Darling intimated that no amount of mere moral support would help him. Rogers was prepared to take extreme measures to endorse the War Office policy, and he drafted a clause of an Imperial bill giving the Governor alone full power over the militia. The bill, however, was dropped and in the absence of either local or imperial legislation, the Office could not enforce its opinions on the colony.

Rogers' drastic proposal to give the Governor sole authority had been largely a reaction to Barkly's warning of the particular dangers of the situation in Victoria. The volunteers were becoming the entire concern of one departmental minister, whose colleagues, as well as the Governor, were denied the influence and information which they might derive when affairs were discussed by the whole Council. It is true that it was not the permanent Under Secretary's habit to struggle against certain defeat, and it is not surprising that he acquiesced in the Victorian policy and in the conditions in New South Wales portrayed by Sir John Young in 1865.[1] Here all correspondence passed through a minister, not directly between the Governor and the

1. C.O.201/533 Young to Cardwell No.14, Feb.16, 1865. Minute by Rogers 25 Sept.1865.

Officers. All decisions were taken by the Governor with his council, and subject to the veto of that body, the men selected their own officers. But Rogers' acceptance was also theresult of his belief in thevital nature of colonial interest in the question. He was quite willing for the ministers to take the initiative, so longhe the Governor authorised correspondence and approved their measures. Unlike Fortescue, he no longger thought it essential for him to take an active part or be cognisant of every detail. The members of the Office might regret that the Governor's sole right to nominate officers had been abandoned in principle. But at the end of the period it could only require him to exercise an influence greater in degree but similar in kind to that over purely local affairs.

The Colonial Office had less tangible reasons for its interest in appointments to non-elective legislative councils than to either the judiciary or the militia. Broadly speaking, it was concerned with the Constitutional stability of the Colonies. All the members agreed that the functions of the Upper House was to act as "a salutory check to hasty legislation" and "to reflect the settled views of the people as distinct from their passing impulses."[1] Implicit in the definition was

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1. C.O.226/93 Dundas to Newcastle No.64 Minute by Rogers 12 September 1861.

the wish to establish some restraint upon the forces of democracy. This, they thought, was best accomplished when Legislative Councillors represented the general education, property and interests of the colony.

The Office left the actual form of Council for each colony to decide. Canada until 1867, Victoria, South Australia, Tasmania and after 1862 Prince Edward Island had elective Houses, while the other colonies retained the older form of nomination by the Governor. But every member of the Office since Sir John Pakington preferred elective Councils. In the first place, they felt that a Council appointed on the advice of ministers, and therefore solely for reasons of party, could not enjoy the respect and confidence of the community. But there was no attempt to encourage a Governor to exercise his discretion where the character of individual new members was concerned. In Prince Edward Island, Lieutenant-Governor Daly confessed that he was unable to persuade any ministry to recommend a particularly suitable landed proprietor, and the Office acquiesced in the nomination of men whom Newcastle contemptuously designated '....utterly

> unfit.....butchers,keepers of grog shops, petty shopkeepers,bankrupts.' 1

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1. C.O.226/90 Daly to Lytton No.21,15 Mar.1859. C.O.226/91 Dundas to Newcastle Confidential 17 Oct.1859. Minute by Newcastle Nov.1859.

In the second place, and more important, the members of the Office felt that there was a grave danger of nominated councils losing their independence completely. Successive ministers would try to swamp the Upper House by advising the Governor to add enough of their partisans to over-ride the opposition. The whole purpose of the Council would be lost if it merely reflected the strength of parties in the Assembly.

The Office exercised some control over the situation in the Maritimes. The Lieutenant-Governors were relieved from responsibility, since they could not increase the numbers of the Council beyond the limit set in their commissions without Imperial sanction. It was only with the greatest reluctance that Dundas was allowed to add five extra members, when he pointed out that his present ministry had a two thirds majority in the Lower House, while nine Councillors appointed by his former advisers in a house of twelve were determined to baulk its measures.[1] Again, the Office refused to meet Tupper's wish that his Government should not have to depend upon the casting vote of the President in the Council in 1863.

The increase was granted in 1865, only when Confederation

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1. C.O.226/90 Daly to Lytton No.32, May 24, 1859. Draft Newcastle to Dundas No.10, 21. Sept. 1859. C.O.226/91 Dundas to Newcastle. Confidential 17 Oct. 1859. C.O. 226/92 Dundas to Newcastle ~~15 April 1860.~~ Confidential 16 April 1860.

appeared in danger,[1] Successful as it was in North America, the Office did not believe that it could apply this control so far afield as New Zealand, where similar conditions existed. When the Fox Ministry in 1861 requested an increase in maximum number of the Council, the Home Government responded by sending out instructions removing all limitations. Newcastle agreed with Rogers that "the attempt to stave off the evil day (of swamping) by Imperial authority" was hopeless.[2]

This pessimism was the result of events earlier in the year in New South Wales. Denison, whose personality had enabled him to insist upon the selection of worthy Councillors and to resist an attempt at "swamping" in 1858, departed for Madras in January. In May the Council was to terminate, and a new one to be appointed consisting of life-members. The Home Government had little confidence in the strength of character of the new Governor, Sir John Young.[3] Rogers admitted that the "theory of responsible Government" made it a question of colonial decision. But he suggested that Young should be given some support in the difficulty facing him. An

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1. C.O.217/233 Doyle to Newcastle No.102, 10 Dec.1863. Draft Newcastle to Doyle No.5, 19 Feb.1864.
2. C.O.209/165 Grey to Newcastle No.33, 30 Nov.1861. Minutes by Rogers 24 Feb.1862 and Newcastle 28 Feb.1862. Draft Newcastle to Grey 31 March 1862, Separate.
3. Gladstone Papers, Gladstone to Newcastle 29 Nov.1858. Newcastle to Gladstone 11 Dec.1858.

earnest warning of the consequences of party appointments was sent to him, with the advice that the present councillors should be re-nominated.

In the event, Young had to contend with the demand of the Cowper ministry to "swamp" the old Council a few days before its dissolution, in order to pass the land bills which embodied the main features of his advisers' policy. He consented, but the device was unsuccessful, since the President and other members refused to attend, and the hastily appointed Councillors could not be sworn in. Young's defence to the Secretary of State was based on two grounds. He argued that his action could not be taken as a precedent.[1] But this did not alter the fact that he had lent himself to a flagrantly unconstitutional proceeding, an example to other Governors. Secondly the Governor declared that it would have been impossible to obtain other ministers if Cowper had resigned. This was indeed the only sound justification for his action, and it was a matter which he alone could estimate properly.

But Fortescue insisted upon an immediate severe censure, which he would not modify, but repeated. He refused to believe that the Governor would not have found support in the legislature and country if he had declined Cowper's advice. The Parliamentary Under-Secretary brushed aside the difficulties too easily, but his attitude proved wise

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1. C.O.201/518 No.37, Young to Newcastle, 21 March 1861.

Armed with the Imperial opinion, Young was able to make a practice of refusing to create Councillors during a legislative session, or more than two at the same time.[1] Rogers had at first been inclined to judge the Governor leniently, feeling that he had been helpless. Nevertheless, he was eager to consolidate the position Young had established, and in 1868 he wished to give Belmore instructions to follow the conventions used by his predecessor.[2] He carried his point against Adderley's view that it was "prying into local politics". Despite his earlier attitude to New Zealand, he thought the constitutional issue serious enough to justify every Colonial Office effort to keep the Governor independent of his Council in this respect.

In this way the Office came by 1868, to deny the Governor any right of dissenting from the advice of his ministers regarding any type of appointments on the ground of the personal unsuitability of their nominee. It supported his discretion only when his acquiescence would directly result in unconstitutional action. Although this was a logical position for the Imperial Government to assume, it is obvious that the Governor would often find it difficult to share its standpoint. The prospect of Lutwyche as Chief Justice, for example, must have appeared to Bowen far more disastrous for the welfare of his colony than swamping the New South Wales Legislative Council in the last few days

1. C.O.210/535 Young to Cardwell 16 Feb.1865.
2. C.O.201/519 Young to Newcastle Separate and Confidential 23 September 1861. Minute by Rogers 28 November 1861. C.O.201/548 Belmore to Buckingham No.1[illegible]9, 29 Sept.1868. Minutes by Rogers 1 Dec. and 16 Dec.1868, and Adderley 2 Dec.1868.

of its existence did to Young. But the members of the Office was not blind to the evils of appointing an indiscreet and partisan judge. If they believed that the Governor could not constitutionally refuse the advice, yet they had some faint hope that through his own personal influence he might persuade his ministers not to tender it.

This hope of the value of ministers' respect for the Governor's views was most clearly seen in the question of the character of the colonial civil services. Sir George Grey, Russell and Ball considered unfounded and exaggerated Hotham's fear that each incoming ministry would dismiss all officials appointed by its predecessors and substitute its own partisans.[1] So far as Australia was concerned their confidence was largely justified.[2] Indeed it was one count in Denison's indictment of responsible government that real power over policy lay with the officials, since frequent changes of Government prevent politicians from learning their departmental duties.[3] In North America the case was different. Towards the end of the 1850's it became clear that the 'spoils system' of the United States was affecting the Maritimes in particular. Once established it was difficult to uproot, since any party attempting it would lose supporters by depriving them of possible rewards. Moreover,

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1. C.O.309/27 Hotham to Grey No.1, 25 Oct. 1854. P.P.H.C. 1854-5, Vol.XXXVII [1902] p.8
2. Although Rogers' observed with disquiet that a Victorian Act of 1863 gave ministers wide scope for jobbery.
3. Denison, op.cit., Vol.11, p.19.

many officers of the public service took an active part in politics and gave a ministry of the opposite party every excuse for dismissing them.

These facts could not reconcile the members of the Office to a practice they strongly believed to be fatal to the integrity and efficiency of administration. Fortescue inaugurated the policy of criticising and stressing the unwisdom of the practice in public dispatches.[1] Newcastle "never lost an opportunity when in British North America" of reiterating these views.[2] Elliot and Rogers joined heartily with the political members in encouraging Macdonnell and Acting Lieutenant-Governor Doyle to persuade their advisers to modify the system.[3] It was one of the comparatively few occasions when the Office threw away the fear of antagonising the colonists and commented frankly on such a delicate and purely local matter. It was also an outstanding example of a blunt instruction to a Governor to use all the influence which he could bring to bear, despite the acknowledged absence of a discretionary power.

Here the members of the Office contemplated the Governor being able to produce Imperial dispatches which would give his opinion more weight in formal or informal discussions with his chief minister or full Council. These discussions were the methods by which the Governor used to try to leave

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1. C.O.226/92 Dundas to Newcastle No.2, 20 Jan.1860. Minute by Fortescue 8 Feb.1860.
2. C.O.217/232 Normanby to Newcastle No.82, 17 September 1863. Minute by Newcastle 30 September 1863.
3. C.O.217/233 Doyle to Newcastle No.100, 26 Nov.1863. Minute by Elliot 9 Dec.1863. C.O.217/235 Macdonnell to Cardwell No.15, 3 Sept.1864. Minute by Rogers 30 Sept.1864.

his mark on specific questions and on general policy. It was, however, only really necessary for ministers to inform him of matters which required his formal assistance. This included a wide range of local activities. But it excluded one of the best ways for him to influence Government - through consultation about proposed legislation, although this was in fact, a general practice. The permanent officials did not believe the Colonial Office could do anything to encourage it. Merivale thought Macdonnell quite wrong in forcing his ministers under pain of dissolution to observe it, and he and Elliot passed over without comment Barkly's statement that he had not learned of his advisers' intention to introduce the bill which he disallowed.[1] Similarly, neither remarked upon a new Tasmanian premier's opposition to the Governor's request for information about his policy.[2] In his turn, Rogers opposed Bowers' demand that the Secretary of State should declare that the Governor's consent must be obtained before his ministers introduced a bill.[3] No doubt the Council should keep him fully informed, but

> '.....Whatever we may hold to be a Governor's rights we have no means of enforcing them against a popular ministry, and the Secretary of State may find himself in the position of encouraging a Governor to enter into a quarrel and then being unable to support him.'

But Portescue set the tone for a different attitude on

1. C.O.13/96 Macdonnell to Labouchere 3 Nov.1857. Minute by Merivale 24 Jan.1858. C.O.309/43 Barkly to Labouchere No.89,4 Dec.1857.
2. C.O.206/237 Young to Labouchere No.52,25 April 1857.
3. C.O.234/16 Bowen to Cardwell Separate 20 Aug.1866. Minute by Rogers (undated).

the part of the political members of the Office. He insisted on pointing out to Tasmania that, although ministers were responsible to the assembly, they were also ministers of the Governor and should receive his assent to their policy.[1] Labouchere and Stanley agreed in pressing this view on the colonies.[2] Again, Carnarvon was not content to accept Rogers' advice when Bowen raised the question. He consulted the Law Officers in search of support, but had to admit reluctantly that the Governor's prior concurrence in measures submitted to the legislature was not legally indispensable.[3] The admission greatly weakened the force of his dispatch commending the need for consultation. His anxiety to erect a useful practice into a prerogative of the Governor damaged it more than the silence enjoined by the permanent officials could have done.

The Governor's ability to influence local policy varied from time to time, from Governor to Governor and from colony to colony. Bowen asserted that "both the executive and legislature always cheerfully defer to my recommendations", but this situation only endured while Herbert led the Queensland Government.[4] Gordon was able to declare in 1864 "I can generally lead my ministers on questions of public

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1. C.O.280/237 Young to Labouchere No.52, April 25 1857. Minute by Fortescue.
2. C.O.309/43 Darkly to Labouchere No.89 4 Dec.1857. Minutes by Labouchere and Stanley. Draft Stanley to Darkly No.5, 12 Mar.1858. C.O.280/237 Young to Labouchere No.52. Minute by Labouchere. Labouchere to Young Confidential 4 Nov.1857.
3. C.O.234/16 Bowen to Cardwell, Separate, 20 Aug.1866. Minute by Carnarvon. C.O.234/17 Cairns to Carnarvon 30 October 1866. Draft Carnarvon to Bowen.
4. C.O.234/7 Bowen to Newcastle ~~10 Dec.1862.~~ No.70, 18 Dec.1862 Bowen to Rogers Private 19 Dec.1862.

policy" although he added

> 'I have to submit to them implicitly on all personal matters. But the continual attempt to manage them is trying, and to some extent degrading to one's self respect.' 1

But Denison, who persuaded his ministers to submit to his wishes on several important occasions, showed how essentially uncertain the Governor's personal influence actually proved to be.

> '.... one is powerless either to do good or prevent evil. One may make suggestions, but these, if adopted, which is by no means certain, are pretty sure to be marred in the working.' 2

Portescue would have liked the Colonial Office constantly to instruct the Governors to persevere in their efforts, while, apart from such cases as the colonial civil services, the other members were content to leave them to exercise such influence as they were able. It was insisted that the forms of parliamentary government should always be observed in local affairs. When a Governor failed to move his advisers, he must still identify himself with them in any necessary public or formal step. Gore Brown tried to dissociate himself from his Council in his speech opening the legislative session in 1862 by declaring that it 'was prepared by my advisers' and using such expressions as 'my ministers intend.'[3] Newcastle put a peremptory end to the attempt. Thus policies such as universal suffrage and anti-pastoral legislation in Australia and high tariffs

1. Gladstone Papers. Gordon to Gladstone January 1864. Vol. clxxxiv.
2. Denison, op.cit., Vol.1, page 296. Denison to Lady C.Denison.
3. C.O.280/355 Gore Brown to Newcastle No.70, 6 July 1862. Minute by Newcastle.

in Canada were implemented with the ostensible support of the disapproving Governors.

Yet policies apparently entirely local might present the Governor with the same problems of discretion as dissolution of appointments. He had to decide whether the effects would in reality be confined to the colony, and also whether they involved any violation of legal or constitutional principles. Head, for example, had to deal with the difficult distinction between local and imperial affairs when Galt made public sponsorship of confederation a condition of entering the Canadian cabinet in 1859. He made up his mind that the local aspect was so important that he must identify himself with his advisers. But he was aware of the risk he was running, and in fact Lytton's first impulse was to recall him, his second to administer a severe rebuke.[1] Fortunately for himself, Head was the trusted friend of Merivale, who managed to convince the Secretary of State that the encroachment upon an Imperial subject was warranted by urgent necessity. Darling, however, blundered blindly in deprecating the British Government's decision to continue convict transportation until 1870 in his speech from the throne in 1864.[2] The Colonial Office did not deny that it was a question of crucial importance to Victoria, but the permanent as well as the political members censured him for lending countenance to his ministers'

1. C.O.42/614 Head to Lytton No.103, 16 Aug.1868.
   Minutes by Lytton, undated.
2. C.O.309/60 Darling to Newcastle No.13, 22 Feb.1864.

sentiments to such an extreme degree.[1]

The Office thought that the Governor also possessed and, ought to exercise, the right to refuse to participate in any proceeding which was not strictly legal. These arose most readily from the habitual delay of Australian legislatures in voting supplies, but the Office was confirmed in its opinion when Denison's council admitted his right to decline its advice to sanction payments in the absence of parliamentary appropriation.[2] Darling once again received the full force of Imperial disapproval[3] but by 1868 experience led the office to try to ease the Governor's position by a narrow definition of illegality. After consultation with the Treasury, it instructed Belmore that he would be morally and constitutionally justified in assenting to disbursements without legislative appropriation, if he considered that it was absolutely necessary and that an indemnity act was certain to follow.[4] When these conditions were not fulfilled, he must refuse advice no matter what the cost to himself in ministerial or parliamentary difficulties.

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1. C.O.309/60 Darling to Newcastle No.13, 22 Feb.1864. Draft Cardwell to Darling, Confidential, 20 May 1864.
2. Denison, op.cit., Vol.1,p.291.
3. See below,Chapter 1V.
4. C.O.201/546 Belmore to Buckingham Confidential 22 April 1868. Minutes by Rogers 16 and 20 June 1868, Adderley 18 June 1868, Buckingham 23 June 1868. Draft Buckingham to Belmore Confidential 29 June 1868. C.O.201/547 Belmore to Buckingham Separate 17 June 1868. Treasury Memorandum. Draft Buckingham to Belmore Separate 5 Sept.1865.

It was clear that the views on the position of the Governor characteristic of the permanent officials had prevailed rather than those of Fortescue. His discretion in internal affairs had been upheld in comparatively few instances - where ministerial advice concerned dissolution, appointments affecting the Constitutional standing of the Legislative Council, illegal action or policies indirectly involving Imperial interests. In addition the prerogative of pardon remained intact. He also maintained his right to decide whether to communicate his correspondence with the Secretary of State to the ministers of legislature although the Office consistently advised publicity.[1] By giving instructions and expressing approval or disapproval, the members of the Office showed that they still regarded him as responsible to them in some degree for his actions in these matters. By making his salary inalterable during his term of office, they assisted him to preserve a certain amount of independence. But many of the powers assumed to belong to the Governor in 1854 had been abandoned by 1868. He was not expected to maintain in its entirety the prerogative of summoning or proroguing the legislature or of reserving colonial bills. He was not required to exercise any discretion over the appointment

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1. See for example C.O.226/92 Dundas to Newcastle 2 March. 1860. Draft Newcastle to Dundas Confidential 2 April 1860.

of judges or other officers, In these as in other local affairs he was purely the servant of, and responsible to the colonists,

The essential difference in the attitude of Fortescue lay in his wish that the Imperial Government should try in every way to postpone the time when colonial opinion should force the Governor to relinquish all discretionary power. Further, he wished to build up a tradition of the Governor's exercise of personal influence strong enough to survive the disappearance of his constitutional rights. His policy might have been followed if either Lytton, Buckingham or Carnarvon had remained longer in office. But the three Colonial Secretaries of longer tenure - Newcastle, Labouchere and Cardwell - in general agreed with the permanent officials in acquiescing in the Governors' dependence upon his ministers.

It is true that more consistent encouragement would have enabled Governors such as Bowen or Macdonnell to play a more active part. But it would merely have increased the difficulties of those who had weaker personalities or faced stronger ministries. It would have led them to adopt untenable positions. Like the remedy of the'Privy Council' advocated by Fortescue, it would have endangered the general harmony growing up between the ministers and Governor, between the colonists and mother country. The danger was, perhaps, not very great,yet it

cannot be denied that the Office was wise in making this consideration its primary concern.

Moreover, the lack of Imperial support for his discretion or influence was not the Governor's chief difficulty in his dual relationship to the colonists and Secretary of State. This was his doubt of what the Colonial Office reactions to his course would be. Although he might be given advice upon a specific problem, the Office refused to answer hypothetical questions, or to admit that events in one colony necessarily formed a precedent for another. No Governor in 1868 could have confidently asserted that the Home Government would require him to exercise his discretion upon the six points we have mentioned. His sole guides were the experiences of himself and his predecessors in his colony, and, in a lesser degree, published correspondence. At the same time, apart from any severe penalty, he knew that disapproval embodied in a public dispatch tended to weaken his position in the colony. But the hardship involved in this situation was inevitable during a period of transition. It would have been a mistake to impose an inflexible definition of the functions of a Governor upon fourteen different communities at a time when the scope of colonial autonomy was gradually increasing, and the ability of a Governor to exercise a power of discretion diminishing in consequence.

Chapter IV

The Constitutional Crises in Victoria.

The constitutional crises in Victoria between 1865 and 1863 provide perhaps the best example of the difficulties surrounding a governor. In 1864 the Colonial Office rebuked Sir Charles Darling for his controversial tone towards his ministers, and his pedantic emphasis on imperial interests.[1] No doubt this incident made him the more ready to fall in with the plans of his advisers in the following year, and the consequences of his actions showed how easily a governor might be led into giving something more than constitutional support to one party. It also showed how easily the Colonial Office might be drawn into the internal affairs of a colony, and made to appear partisan, through the action of its representative.

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At the general election of November 1864 in Victoria the McCulloch ministry was returned to power pledged to a policy of protection to native industry.[2] The policy was

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1. C.O.309/66 Darling to Newcastle No.41 23 April 1864. Minutes by Rogers, 1 July, by Fortescue, 20 July and by Cardwell, 15 August 1864. Draft Cardwell to Darling Separate 22 August 1864.
2. C.O.309/68 Darling to Cardwell No.110 21 November 1864.

forced on the party, for it was supported by all the democratic elements in a colony with manhood suffrage. They believed that the development of local manufactures offered the only remedy for the unemployment which had followed the collapse of the mining boom.[1] The following January the tariff resolutions were passed by the Legislative Assembly, and, in conformity with English and Australian custom, the collection of the new duties was immediately begun. The squatters and large merchants who were represented in the Legislative Council, were strongly in favour of free trade. Consequently, the Chief Secretary announced his intention of "tacking" the tariff to the Appropriation Bill.[2] The Upper House would be compelled to accept the whole bill, or, by rejecting it, to incur the responsibility of throwing the administration into disorder.[3] The Council, however, was not intimidated, and on 25 July 1865 virtually rejected the Appropriation Bill by "laying it aside".[4]

Upon this, the Legislative Assembly drew up resolutions asserting its paramount power over taxation. It determined not to consider any other appropriation bill until this exclusive right should have been recognised by the Council's adoption of the tariff.[5] After an acrimonious exchange of

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1. See C.H.B.E., Vol.VII, Part 1, p.318. Allin, Australian Preferential Tariffs and Imperial Free Trade, p.44.
2. C.O.309/71 Darling to Cardwell Confidential 21 March 1865.
3. Under article 56 of the Constitution Act (18 & 19 Vic.c.55) the Council might accept or reject, but not amend money bills.
4. C.O.309/73 Darling to Cardwell Confidential 27 July 1865.
5. C.O.309/73 Darling to Cardwell No.113, 25 August 1865.

messages between the two Houses, which showed that there was no prospect of a compromise, the Governor informed the Council that, with the advice and concurrence of his ministers he had been able to make a temporary arrangement for satisfying the public creditor.

It was arranged that one of the banks should make an advance to the Governor in Council equal to the amount of the credit of the colony. The bank at once sued for the money in the courts under the Crown Remedies and Liabilities Act,[1] the government confessed judgment, and thus the consolidated revenue became "legally available" for repayment under a warrant signed by the Governor. The sums so secured from time to time were used to defray the costs of administration. This device, which the Victorian Law Officers assured the Governor was perfectly legal, enabled the government to obtain money without legislative sanction for an indefinite time. It was an alternative to incurring the heavy costs which would result if all claimants for payment of salaries or contracts should due the government. Darling reported all these proceedings very fully to the Colonial Office, declaring that the emergency made it his duty to use any legal expedient to prevent administrative confusion. The custom duties continued to be levied under the rates of the rejected tariff, in spite of a decision of the Supreme Court against the practice in early September. The ministry at first refused to accept this decision until the result of an appeal to the Privy

1. 28 Vic. No.241 (Local Act)

Council against it were known. Later the Government shifted its ground and contended that the decision did not become operative until the final judgment was formally entered up in September, after the collection had ceased.[1] Although Rogers described these evasions as "perfectly disingenuous", it is a curious fact that this defiance of the Supreme Court received comparitively little attention in either England or Australia amid the struggle over the powers of the Council.

As a result of Victoria's nine years of responsible government, the Colonial Office had not even contemplated intervention when protection was introduced or when conflict had arisen between the two houses. Taken by itself, the financial arrangement would scarcely have called for comment, and certainly not for action. Newfoundland had resorted to a very similar device, although it did not involve the Governor, just before she had received self government, and had merely been informed that the Colonial Office could not approve.[2] But when it became clear that Darling was personally implicated in the financial transaction, the members of the Colonial Office were unanimous in thinking that it was a matter of Imperial interest. At the same time, the Legislative Council protested in an address to the Queen against the Governor's sanction both of the loan and of the continued collection of the custom duties, and made it almost impossible

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1. C.O.309/74 Darling to Cardwell No.127. Enclosure, Memo. by Attorney General. C.O.309/77 Darling to Cardwell, No. 4, 22 January 1866. Minute by Rogers (undated)
2. C.O.194/142 Hamilton to Grey No.139, 26 December 1854.

for the Imperial authorities to stand aloof.

Although Rogers at once perceived the fundamental cause of the conflict - the fact that the Council represented only a small and wealthy class, whose interests were opposed to those of the democratic assembly - he held that only the Governor's constitutional position concerned the Home Government.[1] The Governor was indeed bound to follow the advice of his ministers, but only provided that their advice was legal. Rogers considered the financial transactions entirely illegal, whereas the Council's rejection of the "tack" had been both legal and constitutional. Hence, by assenting to the advice of his government, Darling had violated the spirit and the letter of the law. With regard to the levy of the new duties on resolutions of the Assembly, the Under-Secretary pointed out the wide difference between doing so when a bill is expected to become law, and when it had in substance been rejected by the Upper House. It was this question rather than the defiance of the judicial decision which occupied his attention.

Cardwell fully agreed with his uncompromising denunciation of the financial arrangement and of the continued collection of the rejected duties.[2] Although later information led to some modification in detail, throughout the crisis the Colonial

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1. C.O.309/74 Darling to Cardwell No.115 18 September 1868. Minutes by Rogers, 17 November 1865. He had prophesied ten years before in reporting on the Constitution Act that such a conflict would sooner or later take place.
2. Ibid. Minute by Cardwell 17 November 1865

Office did not deviate from this decision. It was embodied in a dispatch sent to Darling on 27 November 1865.[3] Cardwell drafted the major part, and it was approved by the Cabinet and Crown Law Officers. The Governor was peremptorily instructed to put an end to both practices. The clarity of Rogers' minutes was, however, lost, and the resulting ambiguity in the dispact enabled Darling to protest that its strictures were grounded upon misapprehension.[1] The dispatch gave the impression that the Governor was being censured as much for the continuing of the customs duties, a ministerial action taken without his intervention, as for his personal action in borrowing the money. On one point Darling had real reason for complaint. Cardwell not only dismissed the excuse of emergency, declaring that persons to whom payments were due could recover them in the Courts, but he asserted, quite wrongly, that Darling himself had stated that no emergency had existed.

Before the Imperial Government's disapproval of Darling's actions became known in Victoria the controversy had reached a new degree of bitterness. In November 1865 the Assembly sent the tariff to the Legislative Council as a separate measure. The Council rejected it again, this time on the ground that it contained a retrospective clause legalising the past collection of duties and asserting the supreme power

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1. C.O.309/75 Darling to Cardwell No.143, 25 November 1865.
3. C.O.309/74 Palmer & Collier to Cardwell 25 November 1865 Draft. Cardwell to Darling No.107, 27 November 1865.

of the Assembly over taxation. The government obtained a dissolution, and at the election were returned to office with a large majority. Darling, in reporting to the Colonial Office, was careful not to mention the Council's reason for rejecting the tariff.

The Governor, on 23 December 1865, forwarded an address from 22 members of the Executive Council appealing to the Queen against the illegal acts of her representative.[1] As We have seen, they were former ministers, who, contrary to the practice in other colonies, did not resign their seats in the Council when they were out of office.[2] The continued membership had been regarded as an honorary distinction, and hitherto the ex-ministers had never acted together as a body. The dangers which Merivale had anticipated from the arrangement now appeared in a somewhat unexpected form. The Councillors did not attempt to interfere directly in the crisis, not even to the extent of warning the Governor of the danger of the situation. But the Colonial Office had to pay particular attention to the address and the Governor's comments on it, since the signatories were men of consequence in Victoria and many would probably hold office in the future when the McCulloch ministry should fall.

Darling's covering dispatch contained no new grounds of defence, but he categorically stated that his ministers had

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1. C.O.309/75 Darling to Cardwell. No.152,23 December 1865.
2. See above page 87.

done nothing which he himself would not have done had the sole executive authority been vested in him. This intensified the concern which the Colonial Office was beginning to feel at his whole-hearted association of himself with the policy of his advisers. Far more serious to the Office, however, were the abusive terms in which Darling described the motives of the petitioners, and illustrated inconsistencies between their past and present opinions. He finally declared that he could never receive any of them as his ministers with any trust or confidence. Rogers summed up the head and front of Darling's offending: "Being thus in the wrong and responsible for being in the wrong he is not content with being so quietly, but sends home for publication ... a violent, and I should say very unjust personal attack on all the leading politicians of the opposite party."[1] He had used expressions which made it seem impossible that he should ever act in Victoria with other ministers than the present ones, and so disqualified himself for continuing in office.

The Parliamentary Under Secretary, W.E.Forster, felt that Darling's conduct and his mode of justifying it " show such ignorance and incapacity as to prove him to be a very dangerous governor for a colony so difficult to govern as Victoria".[2] He did not see how recall could be avoided on ground of safety for the future, in spite of his sympathy for

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1. C.O.309/75 Darling to Cardwell No.152, 23 December 1865. Minute by Rogers (undated)
2. Ibid. Minute by Forster 15 February 1866.

"so old a public servant." He emphasised that it must be made quite clear that there was no intention on the part of the Home Government to interfere in colonial affairs, and that the Governor's offences lay in partisanship and illegal action.

Cardwell obviously agreed with Forster and Rogers. The dispatch recalling Darling explained more clearly what the previous dispatches had meant to convey - that as far as the customs duties were concerned the Home Government did not condemn the original levy in January or expect him to have interfered with it.[1] But when the tariff was rejected he should have protested to his ministers against its continuance and he should have insisted that the decision of the Supreme Court must be respected. Even more reprehensible was his assent to the scheme of borrowing, which still continued. Under the circumstances any colonist had been entitled to complain to the Queen, but Darling's abuse of the petitioners had forced Cardwell to "decide between them and the Governor." Because it seemed unlikely that he could ever co-operate with them as his ministers, the Secretary of State declared that it was impossible "that you can with advantage continue to administer the Government."

Darling, before he received the sentence of recall, had protested that Cardwell had accused him of giving the Assembly victory through the financial arrangement.[2] He answered that

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1. Ibid. Draft Cardwell to Darling 26 February 1866.
2. C.O.309/77 Darling to Cardwell No.4, 22 January 1866.

It was the Legislative Council which had benefited, because it was enabled to continue its resistance without causing administrative chaos. Here, Rogers declared afterwards, Cardwell was dealing generally with the duties of a Governor. He should never take illegal steps, and it was immaterial which party gained by them.[1] The implication that Darling was favouring the ministerial party was, however, fully justified. He stood, as Rogers said in March 1866, self-convicted of partisanship.[2] He had in August 1865 pronounced the eminently fair judgement that the difficulty had arisen from the over-strained exercise of their powers by the two Houses. Yet, as the weeks passed, his attitude towards the Council became increasingly hostile. He gave very little emphasis to its arguments and much to those of his ministers. He attributed its opposition to a desire to force the resignation of his advisers because of the "honesty and good faith" with which they had carried out the provisions of the recent land act. He described the Council's charges against himself as "frivolous and easily refuted."

Darling, if he had been wiser or more cautious, would have maintained that he had been compelled to follow McCulloch's advice because it would have been impossible to secure a new ministry. Although no one in the Colonial Office fully appreciated the difficulty of the Governor's position where

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1. Ibid. Minute by Rogers 17 March 1866. (See also dispatch Cardwell to Officer Administering the Government of Victoria No.32, 26 March 1866)
2. Ibid.

popular feeling was entirely behind the ministry and Assembly, it was disposed to be satisfied by the withdrawal of his support from illegal measures. In all usual circumstances the Imperial Government clearly realised that the exercise of any discretion in local affairs by a Governor must depend on the acquiescence of the colonists. Even in the present situation Rogers admitted that his disapproval was qualified by a doubt whether, since it was apparently impossible to carry on the government otherwise, extraordinary and even illegal methods were not justified.[1] The Governor's outstanding characteristic however, was obstinacy. He was entirely convinced,mainly by his able and vigorous Attorney-General, George Higinbotham, that his course was legal and right. Instead of basing his defence upon expediency, he refused to accept the opinion of the English law officers and reiterated his own law officer's views. His repeated explanations did not, as he hoped, cause the Colonial Office to alter its judgment or to regret his recall. It could, moreover, have no sympathy with the real, though not the ostensible,basis of Higinbotham's argument, which was that the wishes of the majority should prevail immediately over constitutional obstacles.

In Victoria, meanwhile, the crises ended on 13 April 1866 after a month of negotiation. On 13 March the tariff was rejected once more by the Council, because the preamble put forward a claim to the Assemblyls rights over taxation.

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1. C.O.309/74 Darling to Cardwell No.127, 20 October 1865. Minute by Rogers 20 January 1866.

McCulloch resigned, and Darling proceeded to give the lie to his own words by consulting T.H.Fellows, who was not only a member of the Upper House but one of the Executive Councillors who had signed the Address to the Crown, as to the possibility of forming a ministry. Fellowes felt unable to do so, but there was not, Darling pointed out, any unwillingness on the Governor's part to receive him as his minister or to give him the necessary support. Neither was Fellowes reluctant to take office because of personal antagonism to the Governor.[1] This was the only real ground on which Darling might claim that his recall was unjustified. The Colonial Office, however, could hardly have foreseen that Darling would not do as he had said.

A conference between the two houses took place on 13 April, when it was agreed that the Council should pass the tariff shorn of its retrospective clauses and its preamble. On the day the bill was passed and the deadlock ended, the ministry announced that Darling had been recalled. The ensuing popular demonstration in favour of the Governor showed the widespread resentment felt against the interferance of the Imperial Government. Higinbotham voiced the feelings of the most extreme section in declaring that the British Government had no right to interfere with, or even express an opinion upon any action taken by the Governor on ministerial advice.[2]

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1. C.O.309/78 Darling to Cardwell No.41, 18 April 1866.
2. E.E.Morris, Memoir of George Higinbotham, page 124.

The Colonial Office was accused of having been influenced by interested colonists in England. This charge was made in the Assembly, in petitions against the Governor's recall, and in Darling's own dispatches. The accusation was, however, denied in the Office,[1] and there is no indication that the conclusions expressed by Cardwell, Forster or Rogers were founded on any other information than that sent by Darling.[2]

The Colonial Office had endeavoured to deal with the matter from a purely constitutional standpoint. Since Darling had identified himself so closely with the Assembly it was inevitable that in the eyes of the colonists the Office should appear a partisan of the Council. It was true that the sympathies of the members of the Office lay with the Council, which had acted in a constitutional manner and was somewhat more stable than the Assembly. Neither this sympathy, however, nor the fact that the Council was the opponent of protection was the reason why the Upper House was supported by the Imperial Government. It was unfortunate that Cardwell should have ordered that "a prudent discouragement of protection" should be added to the dispatch acknowledging the result of the election in November 1864.[3] It was, however, only the

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1. See minutes by Cox and Rogers on C.O.309/77 Darling to Cardwell 17 February 1866, and minutes by Cardwell (15 June 1866) and Rogers (undated) on C.O.309/78 Darling to Cardwell No.58, 25 April 1866.
2. This information was composed of dispatches, with their enclosures of various kinds, such as extracts from debates legal opinions and Darling's correspondence with his ministers. He also sent regularly copies of the two chief newspapers the Argus and the Age.
3. C.O.309/68 Darling to Cardwell No.110, 21 November 1864.

conventional expression of regret that a member of a government pledged to free trade felt himself impelled to make. In actual fact the Colonial Office had long since decided to abandon any control over the tariffs of responsibly governed colonies, except with regard to differential duties.[1]

The real issue to the Colonial Office was the position of the Queen's representative. The first question was whether the Governor should refuse to act unconstitutionally even when the majority of the people in the colony supported such action. The second was whether a governor who had revealed himself as a partisan could continue in office. The Imperial view was the Governor's duty was to uphold the constitution and the law despite any political difficulties. Here, however, a mistaken judgment on the propriety of his ministers' course could be retrieved by withdrawing his support. But on the second point the Colonial Office felt strongly that once a Governor's reputation for impartiality had been compromised, it was almost impossible for him to revert to his proper attitude of neutrality between parties. One of Forster's minutes makes it clear that the possibility of recalling Darling, because of his increasing tendency to identify himself with the Assembly, had been discussed even before his attack upon the Executive Councillors.[2] That attack,however, finally convinced the Office that Darling had become unfitted to carry on his administration.

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There was an almost immediate revival of the controversy

below
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1. C.O.309/75 Darling to Cardwell No.152,23 December 1865.
2. Minute by Forster 26 February 1866.

between the two Houses, and the Colonial Office was once more drawn into Victorian affairs. The Assembly voted a gift of £20,000 to Darling's wife. He very properly informed the House that he could not accept the money until he had received the Queen's sanction.[1] On his return to England he asked the Colonial Secretary to allow Lady Darling to accept the grant.[2] The regulations of the Colonial Service forbade Governors to receive presents either during or after their administration, so that their office might not be exposed to suspicion of corruption or partisanship.[3] In October 1866 the members of the Colonial Office agreed that Lady Darling could not be allowed to accept the gift. Rogers characteristically showed the keenest perception of the punishment Darling would feel himself to have undergone for his "errors of temper and judgment"[4] Yet he fully concurred with Lord Carnarvon, who had succeeded Cardwell in June, in thinking that any deviation from the rule would prejudice the interests of the whole Colonial Service.[5]

On 12 October 1866 a letter based on Carnarvon's minute was sent to Darling.[6] The Secretary of State, it was declared, felt bound "distinctly to inform you that, if you desire to retain your connection with the Colonial Service ... you are not free to accept the Vote." Carnarvon,[7] C.B.Adderley the

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1.C.O.309/78 Darling to Cardwell Separate 7 May 1866 Encl.
2.C.O.309/82 Darling to Cardwell 12 September 1866.
3.C.O.Regulation No.33(See C.O.List 1864 p.108) The Assembly tried to circumvent the regulation by making the grant to Lady Darling. The Colonial Office had no hesitation in brushing this evasion aside.
4.C.O.309/78 Darling to Buckingham 22 April 1867.Minute by Rogers 27 April 1867,C.O.309/84 Manners-Sutton to Buckingham No.148,26 October 1867. Minute by Rogers (undated)
5.C.O.309/78 Darling to Cardwell Separate 7 March 1866.Minute by Carnarvon 3 October 1866.
6.Ibid.Draft Adderley to Darling 12 October 1866.
7.Hansard,3rd series,vol.cxci,8 May 1868,Cols.1982-3.

Parliamentary Under-Secretary, and Rogers[1] explained nearly two years later that this had been a warning of the penalty - that is, retirement - which would follow an act disapproved of by the Government. It did not in any sense authorise that act. Darling, however, quite naturally inferred that if he retired and renounced his claim to a pension, the Colonial Office would acquiesce in his accepting the grant. It appeared that the Office accepted his interpretation of the Colonial Secretary's letter, for, when he finally resigned from the Service on 17 April 1867, his retirement was communicated to the new Governor of Victoria, Sir Henry Manners-Sutton, without instruction or comment.[2] This amounted, Rogers said later, to a "tacit instruction" to him not to resist the introduction of the vote to Lady Darling into the Legislature.[3]

It was explained later that since Darling was now a private citizen his acceptance of a colonial gift would not adversely affect the Service or compromise the general reputation for impartiality enjoyed by Governors. The Imperial Government still disapproved of the grant, and would have forbidden its introduction into a Crown Colony. It was in practice, however, impossible to forbid a responsibly-governed colony to decide on such a matter for itself, for a conflict between the mother country and the colony over the latter's rights would almost

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1.C.O.309/89 Darling to Buckingham 4 May 1868. Minutes by Rogers 5 May and Adderley 6 May 1868.
2.C.O.309/86 Darling to Buckingham 17 April 1867. Draft: Buckingham to Manners-Sutton 10 May 1868.
3.C.O.309/84. Minute by Rogers (undated) on Manners-Sutton to Buckingham Confidential 18 July 1867.

certainly follow.[1] In view of the difficulty Manners-Sutton had had in restraining his ministers from advising him to recommend the grant to the Assembly before Darling's retirement, this contention was justified. It was also very unlikely that Darling's case would set a precedent. But at the time, perhaps because of the bulk and confusion of Darling's correspondence with the Secretary of State, the Colonial Office seems to have acted with little thought of these considerations. Nor does it appear that either the new Colonial Secretary, Buckingham, or the permanent officials gave any real consideration to the possible results of the introduction of the Darling grant in Victoria.

Manners-Sutton on the advice of his ministers recommended that provision for the grant should be made in the estimates on 23 July 1867.[2] There was less of the character of a "tack" in including the grant in the estimates than in including the tariff in 1865, but the intention of the Assembly to assert its financial supremacy over the Council was the same. A situation parallel to that of 1865 arose when the Council rejected the Appropriation Bill on 2 August, except that the passage of a temporary supply bill prevented a resort to the Crown Remedies

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1. Hansard, 3rd series, vol.cxxi, 8 May 1868 Speech by Buckingham Cols.1967-74. Speech by the Lord Chancellor (Sir Hugh Cairns) 1987-94. C.O.309/84 Manners-Sutton to Buckingham No.148, 26 October 1867. Minute by Rogers 20 December 1867. C.O.309/85 Manners-Sutton to Buckingham Confidential 26 April 1868. Minute by Adderley 26 May 1868.
2. C.O.309/84 Manners-Sutton to Buckingham Confidential. Under the Constitution Act all money votes had to be initiated by the Government in the form of a message from the Governor to the Assembly (18 & 19 Vic.c.55 sec.11)

Act.[1] Gradually the merits or demerits of the Darling question were lost sight of in the struggle between the two Houses over their respective powers.

The Governor maintained a constitutional attitude in this renewal of the conflict between the two branches of the Legislature. He spared no effort to mediate between the parties, while preserving an attitude of neutrality and being careful, as an Imperial Officer, to express no approval of the grant iself. In September he considered the situation so serious that he was prepared to take McCulloch's advice and to recommend the vote separately to each house. This unusual proceeding might indeed make the Governor appear to be personally instead of merely formally advocating the grant.[2] But he felt that the gesture, by enabling the Council to discuss the vote apart from the remainder of the estimates, might persuade the Upper House to assent to the whole Bill. Buckingham and Adderley regarded his intention to introduce separate messages as open to misinterpretation;[3] otherwise the Colonial Office fully approved of his conduct.

The separate messages were of no avail and on 16 October the Council rejected the Appropriation Bill again. Since he could see no prospect of forming another ministry, Manners-Sutton

1. When the Council refused to pass a second temporary supply bill in November 1867, the ministry intended to have recourse to the Crown Remedies Act, though without borrowing from a bank. They were prevented from doing so by a judgment of the Supreme Court on 3 and 5 December that the Act did not make money "legally available" without legislative appropriation.
2. C.O.309/84 Manners-Sutton to Buckingham Confidential 28 September 1867.
3. Ibid. Minutes by Adderley 20 November and Buckingham 25 November 1867.

agreed to give McCulloch a dissolution. He told Buckingham "a conflict such as that now in progress strains the constitution ...and I cannot assert that the constitution will endure the strain much longer."[1] His great fear was that his ministry, which was bound to be successful at the election, would ask him to take some illegal action to destroy the Council's powers. His inevitable refusal would convert the quarrel into one between the colony and the Home Government. The only solution which he could see was the surrender of the Council on this question, and by giving way it might hope to preserve some influence for the future. Therefore on 28 October 1867 Manners-Sutton asked the Secretary of State to express an opinion that it would be advisable for the Council to accept the grant.[2] He hoped that the Upper Houses, always more prone than the Assembly to look to England for guidance, would be influenced by the statement.

It is clear from Roger's minute that he agreed with the Governor about the dangers and implications of the situation.[3] He was willing to give the opinion asked for, although it was a more positive intervention in an internal question that he would usually have advised. He thought that the Council had been right in principle, if unwise in some of its actions, throughout the crisis. He beliéved however, that the function of the Colonial Office was now to assist it to surrender while retaining as much dignity and power as possible. Adderley also,

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1.C.O.309/84 Manners-Sutton to Buckingham No.148, 26 Oct.1867.
2.C.O.309/84 Manners-Sutton to Buckingham Confidential 28 Oct. 1867.
3.C.O.309/84 Manners-Sutton to Buckingham No.148, 26 October 1867 Minute by Rogers (undated).

despite his advanced views on self-government, felt that the Governor's wishes should be met.[1]

But the dispatch sent to Manners-Sutton on 1 January 1868, far from urging the Council to give way, encouraged it to resist.[2] The Governor was instructed that, should the Council once again reject the bill combining the Darling grant with the estimates "he ought not to be made the instrument of enabling one branch of the Legislature to coerce the other". Therefore, he ought not to recommend the vote again unless it was clear it would be sent to the Council as a separate bill. This was far more than an opinion such as Manners-Sutton had requested. It was a positive command regarding his future course of action, only modified by a clause authorising him to use his discretion if circumstances should have greatly changed. In the earlier crisis the Home authorities had been concerned with the Governor's position, and to them the question of the Legislative Council had been incidental. Now the Colonial Office made a direct intervention in favour of the Council in the struggle between the two Houses.

It seems reasonable to conclude that Buckingham himself was responsible for the command to the Governor not to introduce the combined bill again. The draft dispatch was written by Rogers. The first part, however, followed almost exactly the wording of the Duke's minute,[3] it stated that he did not

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1. Ibid. See Adderley's notes on Roger's minute.
2. C.O.309/84 Manners-Sutton to Buckingham, Confidential, 26 Oct. 1867. Draft Buckingham to M.Sutton No.1, Jan.1.1868.
3. C.O.309/84 Manners-Sutton to Buckingham No.148, 26 Oct.1867. Minute by Buckingham 29 Dec.1867. He ended by remarking that he would see Rogers following day, but no record of this meeting

disapprove (Rogers had suggested that he should positively approve) of the Governor's separate messages, and regretted both that the Assembly had included the vote in the estimates and that the Council had not used the separate messages to make concessions. Disraeli concurred in,but probably did not inspire, the instruction.[1] If Rogers had originated it he would have shown an inconsistency rare in him. Adderley was certainly opposed to this direct intervention at the time, and described it as a "step out of the constitutional course."[2] The instruction was, moreover, far more characteristic of Buckingham than of either of the Under-Secretaries. Responsible government did not imply to him quite the same measure of Imperial non-interference as it did to them. He was able and shrewd, but he had a tendency to concentrate on a single aspect of a question.[3] Where Rogers considered the general position of the Council and the whole Victorian situation, the Secretary of State may well have felt that the most important factor was the immediate coercion of the Council and the need for the Governor not to be associated with it in even the most formal manner.

This dispatch produced a most unhappy effect in Victoria. The McCulloch ministry resigned on 6 March,because "Her Majesty's Government"... have seen fit to depart from their former determination that the controversy should be locally

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1. Hughenden Papers. Buckingham to Disraeli, 1 Jan.1868. Disraeli only saw the draft on the day it was sent to Victoria,so in all probability he merely approved of it.
2. C.O.309/88 Manners-Sutton to Buckingham Confidential 26 April 1868. Minute by Adderley 26 May 1868.
3. See also Roger's opinion of Buckingham in Letters of Lord Blachford (edited by G.E.Marindin), page 264.

decided."[1] Manners-Sutton was without a ministry until 6 May, when Charles Sladen, a member of the Council, managed to form a minority Government. During the interval the session could not be formally opened and the colony was without supplies. A similar situation might very possibly have arisen without the Governor's determination to carry out the Imperial instructions. The dispatch however, undoubtedly confirmed the Council in their resistance and aroused great indignation in the Assembly as an Imperial attempt to abridge its financial rights. There was an almost desperate note in the Governor's confidential dispatch of 26 April.[2] He pleaded for an "authoritative" announcement from Buckingham, only to be used if absolutely necessary, that the Council must be held responsible for a situation in which the Queen's Government could not be carried on, if it continued to oppose the wishes of the majority.

Rogers, Adderley and Buckingham all considered that it was quite impossible to comply with this request.[3] The Colonial Office was in a measure responsible for the situation on account ofthe dispatch of January 1, and could not cast responsibility on the Legislative Council, which was upholding it. The Office had done all it could be assuring the Council on 1 February that it need not continue to refuse assent to the wishes of most of the colonists simply because the grant involved a breach of

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1. C.O.309/87 Manners-Sutton to Buckingham No.53, 28 March 1868. Enclosure No.2.
2. C.O.309/87 Manners-Sutton to Buckingham Confidential 26 April 1868.
3. Ibid. Minutes by Rogers (undated) Adderley 26 May 1868 and Buckingham 25 and 27 May 1868.

Imperial regulations.[1] But although the Secretary of State had waived the claim of Imperial interests to be considered by the Council, the Upper House was still relying on the protection his instructions had given it against coercion by the Assembly.

When Manners- Sutton's appeal reached England,however, the Colonial Office was fairly confident that another means had been found to end the crisis. On May 4 Darling had declared that until Buckingham's speech in the House of Lords on the "impropriety of the grant" he had retired under the impression that the Colonial Office would approve.[2] Adderley saw in this a way of escape from the difficulty, for he suggested that "it might be indicated that it was still open to Sir Charles Darling to decline the grant and replace himself from under the ban".[3] It is not clear whether any members of the Colonial Office did communicate with Darling or with Sir Roundell Palmer, who was in correspondence with him, but on May 19 he was informed that he would be allowed to return to the Service if he did so unconditionally.[4] Manners-Sutton was informed by telegraph and dispatch of Darling's withdrawal of his claim to the grant.[5] Almost a month later, on July 18 1868, the Governor telegraphed that, as had been hoped, Darling's withdrawal had been recognised by all parties as ending the dispute,

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1. C.O.309/84 Manners-Sutton to Buckingham No.152,27 Nov.1867. Draft: Buckingham to Manners-Sutton 1 Feb.1868. Rogers and Adderley had wished to use much stronger terms,but even Buckingham's words contained an encouragement to the Council to give way.
2. C.O.309/89 Darling to Buckingham 4 May 1868.
3. Ibid. Minute by Adderley 6 May 1868.
4. C.O.309/89 Darling to Buckingham 14 May 1868.Draft: Adderley to Darling 19 May 1868.
5. C.O.309/89 Darling to Buckingham 23 May 1868.Draft: Buckingham to Manners-Sutton No.44.26 May 1868.

and the McCulloch ministry had returned to office.[1]

It may be argued that the Colonial Office showed a great want of foresight in failing to realise that if the Darling grant were introduced into Victoria at all, the controversy between the two Houses was bound to be renewed. The mere prohibition of its introduction would have caused a dispute between the colony and the Imperial Government.[2] The only solution would have been for the Colonial Office to have persuaded Darling at the outset to give up his claim to the vote. Since there was not thought of re-employing him, this could only have been done by granting him a retiring pension, although he would not reach the age of 60 for three years. Carnarvon, however, refused Darling's application for an immediate pension, and made no effort to induce the Treasury to grant it.[3] Certainly such an expedient would have been no more undignified than reinstating Darling in May 1868, with a pension retrospective to October 1866.

Once it had been decided that the grant to an ex-Governor was not an Imperial concern, the Colonial Office had left the matter to the Colonists and been content to encourage and support the Governor in his efforts at mediation. From this policy the Office had abruptly departed by the instruction of

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1. C.O.309/88 Manners-Sutton to Buckingham Telegram 18 July 1866 Just before the news reached Victoria Sladen's minister of Justice proposed to introduce the grant into the Assembly as a separate bill, with the certainty the Council would accept it. Turner declares this course would have had no success (p.146) but Morris suggests that probably both Council and Assembly would have accepted it.(P.140).
2. See page 148.
3. C.O.309/82 Darling to Carnarvon 24 Oct.1866 and 4 Nov.1866. Draft Rogers to Darling 3 Nov.1866. Carnarvon deemed the medical evidence inadequate.

January 1. There was no such clear justification for limiting the Governor's discretion as there had been in the earlier crisis. Manners-Sutton had indeed betrayed some impatience of the Council and had asked the Office to try to influence it, but these opinions and requests, based on what he considered the needs of the situation, were embodied in confidential dispatches which were not published at the time with the other papers. Within the colony he had maintained an attitude of strict neutrality and preserved cordial relations with both sides. He had not been requested, ~~not would have consented,~~ to take any illegal action, and had made it very plain that he would never consent to do so. The recommendation of money votes to the Assembly was recognised to be a purely formal action on the part of the Governor, and was a very different matter from Darling's personal co-operation with his advisers. Moreover the coercion of the Legislative Council was by no means so obviously unconstitutional as in 1865-66. The relative position of the two Houses was clearly a matter for a self-governing colony to decide for itself. It would have been far more expedient and far more in keeping with the principles of responsible government for the Secretary of State to have refrained from any direct participation.

However weak it might appear, the Colonial Office was undoubtedly right in reinstating Darling. This was the only means by which the Office could retrieve a situation for which it was partly responsible. There had been much ambiguity and lack of clear thinking in its attitude towards the vote, and the intervention of January 1 had intensified the deadlock

in Victoria and aroused bitter hostility to the Imperial Government. Although the ending of the crisis offered no final solution to the dispute between the two Houses, the Colonial Office acted in the interests of Victoria itself, where there was much hardship and considerable unrest, and of good relations between the mother country and the colony in seizing the opportunity to end the present controversy.

Chapter V.

The Government of Native Peoples.

For some years after the inauguration of responsible government certain Governors continued to be enjoined by a clause in their instructions to

> 'promote the religion and education of any native inhabitants and do especially take care to protect them in their persons and free enjoyment of their possessions, and do .... prevent and restrain all violence and injustice which may be practised or attempted against them, and you take such measures as may appear to you ... to be necessary for their conversion to the Christian faith and their advancement and civilisation.' 1

This comprehensive charge reflected the British Government's conception of its duty towards aboriginal peoples during the thirty years before 1850, although that duty had been only intermittently and imperfectly carried out. In 1846 Lord Grey had set himself to make good the deficiencies and had embarked upon a constructive native policy in South Africa. Government efforts had been practically limited to protecting the property of the two races from one another upon the frontier. Grey realised that lasting peace would be possible only if Imperial power could restrain the warlike tendencies of the tribes, and could establish civilising agents and institutions

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1. C.O.380/118 Draft Instructions to Sir R.G.Macdonnell.

among them. He had not shrunk from the extension of Imperial control and of frontiers involved. His attitude in New Zealand was similar, although here the conception and execution of native policy were Sir Geog Grey's, not his own. In South Africa, unfortunately, war and disaster followed initial success. The insistent demand of the British parliament and people for economy in military expenditure led to the grant of independence to the Boer republics in 1852 and 1854, and to the public relinquishment of any responsibility for native welfare beyond the boundaries of the Cape, British Kaffraria and Natal.

This was a blow not only to Grey's active policy, but also to the old ideas of Imperial duty. It was bound to have reactions beyond South Africa, particularly in New Zealand, where the settlers might need military protection against the numerous and warlike Maori people. In this way the Imperial Government's anxiety to cut down financial and military commitments became inextricably linked with the obvious question which arose in Canada, Australia and New Zealand - did the right of self government given to the settlers include the right to govern the native peoples living in these colonies? Was the clause in the Governor's Instructions mere common form, or did he retain as an Imperial officer special powers and duties towards the

native inhabitants?

In Canada these questions were in part already answered in 1854. After the report of the commission of 1842 the Imprial Government had gradually reduced the portion of the grant from the Exchequer which had been used for presents to the Indians, and in 1852 it was decided[1] to bring the practice to an end in 1858, notwithstanding their protests. The Home Government was also determined to relieve itself from the cost of administering the Indian department in other respects, and hoped that this could be fully achieved about the same time. But it is clear that the Colonial Office thought that the department would continue to be administered by the Governor's civil secretary. This official was personally responsible to the Governor in his capacity of Superintendent-in-Chief of the Indian department as in his other duties. Accordingly, the members of the Office approved the plan put forward in 1854 for making the tribes pay for the services of the department by 1858 from the income derived from the gradual alienation of their reserves.[2] The part of the provincial government was to be limited to trahsferring some of the money traditionally voted for hospitals and schools in Lower Canada to administration

1. Shortt and Doughty, Canada and its Provinces, Vol.V, page 340.
2. C.O.42/595 Elgin to Grey No.66, 18 Dec.1854. Minutes by Elliot 13 Jan, Peel 18 Jan. and Grey 19 Jan.1855.

Head, however, forced the Office to realise that there was no alternative to the administration of Indian affairs with Imperial money under the authority of the Governor except their administration with colonial money under the authority of the colonial ministers.[1] He approached the subject "with pain", since he believed the Government right to try to protect the British taxpayer. Yet he could hardly reconcile the reduction of the grant with Imperial duty towards the aboriginal people. "Catching at a straw", he therefore pressed the scheme of his Superintendent, Lord Bury, which required Parliament to make a final grant of £70,000. This sum was to be invested, and the interest would provide the means for the Governor to continue to control the department. To some extent, Head feared that the colonial Legislature would not be willing to give financial assistance to the Indians. But he felt that the real danger lay in the settlers' "covetous desire for land". Already there was a good deal of "squatting" upon the reserves, and colonial impatience of these undeveloped tracts was bound to grow as the progress of railways increased their value and speeded settlement. In consequence, an agitation for handing over control of Indian lands to the legislature

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1. C.O.42/599 Head to Grey No.154, Dec.15,1855. C.O.42/603 Head to Labouchere Separate.Confidential 8 Feb.1856.

must soon arise, and would be difficult to resist. Head suggested that, since Indian reserves were held by the Crown in trust for the Indians, the lands should be placed under the guardianship of the Court of Chancery of Upper Canada. As assistant judge in Chancery should be appointed to decide when the lands ought to be sold, to preside over the sales and to administer justice when questions of Indian property were involved. This, the Governor felt, offered the best hope of security against any attempt by the legislature to dispossess the Indians. It involved the anomaly of combining judicial and administrative functions, but the Civil Secretary would continue to perform administrative duties not involving land.

Head's dispatches pleading for the protection of the Indians were probably the most eloquent he ever wrote, but they left the Colonial Office unmoved. While complete control by the colonial executive and Legislature had not been fully considered earlier, the members easily accepted the idea. Elliot and Merivale welcomed it, and may even have intentionally misrepresented Head to some degree. Elliot ignored his provision for land sales, and wrote as if the Governor intended that

> "the whole of the vast property be for ever set aside....perhaps eventually for the last red man of the province." 1

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1. C.O.42/603 Head to Labouchere Separate & Confidential 8 February 1856. Minute by Elliot 5 June 1856.

Merivale declared that the suggestion amounted to the immediate transfer of power, since the consent of ministers and legislature would be needed for an act creating the assistant judge in chancery, and giving him the necessary powers.[1] In reality, the proposed act was designed to keep Indian affairs under independent control, and the Governor expected consent if actions were taken before the constituencies realised how far the reserves threatened to hinder settlement. But even if Labouchere had not preferred to listen to the permanent officials rather than to Ball's tentative advocacy of the Governor's more paternal attitude[2], the scheme was doomed in the absence of Imperial financial support. None of the members had any hesitation in rejecting the proposal for a grant of £70,000. Already the British estimates for Indian affairs were less than half of the £29,000 which had been voted annually in the forties, and were decreasing by about £2,000 a year. It was certainly not the moment, with the Crimean war still in progress, to request such a sum from Parliament.

Realising this, Head appointed a commission which reported in 1858 upon the best way of providing for the administration of Indian affairs.[3]

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1. Ibid. Minute by Merivale 6 June 1856 and notes on draft Labouchere to Head Confidential 11 July 1856.
2. C.O.42/603 Head to Labouchere Separate & Confidential 8 Feb.1856. Minutes by Ball 9 June and Labouchere 10 June 1856
3. C.O.42/623 Head to Stanley No.56,12 May 1858. Encl. C.O.42/623 Head to Newcastle No.48,18 May 1860. Encl.

In 1860 a Canadian statute accordingly placed the department in charge of a responsible minister in the same way as other local matters. In the meantime, Elliot supervised the conduct of Indian matters in the Colonial Office. He devoted himself to scrutinizing accounts and pressing the Governor to reduce his requisitions from Imperial funds with the same ruthless efficiency which he applied to cutting down the claims of the Tasmanian convict department.[1] He was deaf to the appeals of the Indian superintendent and his imaginative sympathy was not aroused until the transfer of authority was in sight. Then some paragraph in the commissioners' report led him to persuade the unwilling Lytton to demand from the Treasury an extra £200 for two years to provide blankets for "some poor old Indians".[2] Otherwise the Office remained consistent in trying to hasten the end of its responsibility.

Economy was undoubtedly the chief motive for Colonial Office policy towards the Indians. But it would be unjust to the members not to realize that they were also moved ny ideas concerning native peoples which were prevalent at the time. There was, for example, the belief

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1. See for example C.O.42/605 Head to Labouchere No.171 30 Dec.1856. Minute by Elliot 5 Jan.1857.
2. C.O.42/613 Head to Stanley No.56,12 May 1858. Minutes by Elliot 7 June 1858, and Lytton 9 June 1858. C.O.42/614 Head to Stahley No.73,5 June 1858. Minute by Elliot 21 June 1858.

that aborigines were doomed to extinction in face of white settlement. Elliot paid no attention to the protest of Head and Superintendent Pennefather that there was no recent evidence of a marked degrease in the numbers of Indians, and in 1861, in contrast to his optimism of twenty years earlier, Merivale accepted extinction as the inevitable and early fate of Australians and Indians alike.[1] This was a further argument for economy. It seemed reasonable to refuse Imperial intervention if it could do not more than make the life of the last few generations easier. General policy and specific steps were influenced even more by two other conceptions. In the first place, the whole principle underlying responsible government, that local circumstances were best judged by the colonists themselves, could readily be applied to Indian affairs. Even the Governor and his civil secretary could scarcely enjoy the same intimate knowledge of conditions as the Canadians. Moreover, the worst danger of conflict between the two races had passed away in a long-settled colony. Elliot was certainly sincere when he trusted that British policy

> "is not inconsistent with the welfare of the Indians. The Canadians...relations with them have heretofore been...kindly: they enter into fellowship with them in the chace (sic) in the adventurous canoe...they have never remorselessly driven these poor people from one district to another,and they have been trained by the exertions of their government to the habit of viewing them with some equity and humanity." 2

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1. Merivale, op.cit.,pp512,513.
2. C.O.42/613 Head to Stanley No.56,12 May 1858.Minute by Elliot 7 June 1858.

In the second place, the permanent officials, in common with the majority of their contemporaries, believed that the best native policy aimed at the amalgamation of the two races in one society. The Office contained no adherents of the old missionary ideal of segregating natives from contact with white settlers. It is true that the members did not always agree upon method, nor had they worked out the full implications of the idea. Amalgamation was sometimes considered as an alternative to extinction, sometimes as a transitional step towards it. Merivale tended to agree with Governor Grey that assimilation was best achieved through bringing native peoples immediately under European laws and institutions. Rogers was wiser in advocating the more gradual process of fostering what was judged good in native institutions, and he hoped progress made under them would ultimately lead to amalgamation.[1] Elliot summed up the general effect of the policy of refusing to preserve the "unsophisticated savage". Contact with whites might lead to contamination, but

> "at least it gives the Indians the chance of rising in the social scale, while the other method may gratify a taste in romance, but perpetuates idleness and indigence." 2

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1. See for example C.O.209/156 Gore Brown to Newcastle No.120, 26 Nov.1860. Minutes by Rogers 21 March 1860.
2. C.O.42/613 Head to Stanley No.56,12 May 1858. Minute by Elliot 7 June 1858.

Although the members of the Office did not always realise it, the policy tended to make them ready to transfer power over natives to the colonists, since 'the closest contact would be achieved by placing the two races under precisely the same authority.

In the light of these factors, it is not surprising that the care of the Australian aborigines passed without discussion to the settlers upon the inauguration of responsible Government. Here there was no question of property, and funds were supplied by the colonial, not the Imperial,Government, although hitherto they had been expended under the direct control of the Governor. Nevertheless, the members of the Office showed a good deal of concern over the fate of the natives. They had none of the confidence in their just treatment by the settlers which they felt with regard to the Indians. In consequence, although the Office admitted itself powerless to enforce any action, any references in dispatches were studied attentively.

Merivale and Rogers were quicker than the political members to notice any indications of cruelty, and of the two Rogers was somewhat more vigorous and less impersonal in pressing the need for a wise and humane policy upon the Governors.[1] Among the Secretaries of State,Newcastle

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1. See for example C.O.234/5 Bowen to Newcastle No.74,16 Dec. 1861. Minute by Rogers 1 Mar.1862,and Draft Newcastle to Bowen No.70,8 March 1862.

and Cardwell both showed considerable interest and a readiness to censure and to warn.[1] But Lytton stands out as the one most moved by reports of the sad condition of the aborigines, despite his indifference to the distress of the Indians.[2] He alone made a constructive suggestion for remedies, declaring earnestly

> "It is not our duty as Christians to relax our efforts in disappointment."

It was clear that humanitarian sentiment was still too strong among the members for them to consider self-government any barrier to frank comment and admonition upon the treatment of the natives.

But a policy of mere admonition and advice was obviously inadequate for New Zealand, which presented very different problems. In the North Island, the land hunger of the settlers, who were increasing every year through immigration, constantly threatened serious conflict with the Maoris. Still outnumbered, the Europeans looked to the Home Government for military protection to almost the same degree as against a foreign power.[3] At the same time, the Imperial Government stood in some sense in a special relationship to the Maoris, since the Treaty of Waitangi, signed in 1840 by a few chiefs, was deemed to apply to them all.[4] In return for recognition

1. See for example C.O.13/115 Daly to Cardwell, 23 Dec. 1864. Minute by Cardwell (undated). C.O.234/1 Bowen to Newcastle No.33, 10 Apl. 1860. Minute by Newcastle 4 July 1861.
2. See above p.165. C.O.201/503. Denison to Stanley No.133, 13 Sept. 1858. Minute by Lytton, 27 Jan. 1859.
3. In 1858 Maoris numbered 56,049. Europeans, 65,701. CHRE., vol. v11, part 2, page 143.
4. See Morrell, op.cit., page 105.

of her sovereignty, the Queen confirmed them in possession of their lands and pledged hereself to provide them with protection and good Government. The events of the forties had shown that it was far from easy in the Colonial Office to reconcile its duty of protection to both races, and the problem was still very much alive in 1854.

Yet the Maori people were not mentioned when the Colonial Office discussed the grant of responsible Government to New Zealand in the later months of 1854. It is possible that the members believed that they would be comparatively unaffected by the transfer of power, since the state of tension growing out of the rise of Maori national feeling as their territories contracted was not unknown in London. Sir George Grey had left the colony tranquil when he returned to England in 1853. It was as yet far from plain that his success had been largely personal, and much smaller than he himself had represented.[1] It is true that the help he gave to certain chiefs for alleviating social and economic condi-tions has been too abruptly dismissed as a "sugar and flour" policy; and he had appointed resident magistrates

1. J.S.Marais, Colonisation of New Zealand, Chap.VIII, pp.265-275. Morrell, op.cit., pp.318-340.

to deal summarily with disputes between Maoris, or between settlers and Maoris. But the very few who penetrated into the Maori country were virtually helpless. There the missionaries exercised the only real European influence. Otherwise, only the Maoris living on the borders of White Settlements were affected. The Governor had only "touched the fringes of the problem"[1] and had not left behind him institutions or trained administrators to foster his design of amalgamating the races. But since Grey's return, Acting Governor Wynyard's dispatches had conveyed the impression that European and Maoris continued to live in harmony. In England, Colonel Thompson was not so very far in advance of general opinion when he objected to the Governor being given £7,000 a year to devote to the welfare of the natives.[2] He considered this an insult to their equal satus with the colonists. The Maoris were pictured as all but fully civilised, even Europeanised. While the members of the Office did not hold such exaggerated views, it is possible that they believed that the good feeling between the races, together with Grey's measures, would lead the Maoris to submit to Government by the Assembly.

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1. Marais, op.cit., p. 272.

2. Hansard, Vol. cxxi, col. 136, 3 May 1852.

Again, they may have assumed that the Constitution Act of 1852 gave the Governor ample power to protect the Maoris against an Assembly in which they were not represented.[1] He was authorised to withdraw purely Maori districts from colonial jurisdiction and to administer them according to native law and custom.[2] The Crown's right of pre-emption over native land was delegated to him, and was looked upon as a safeguard of Maori interests against the rapacity of individual settlers.[3] If the term "Governor" was still to be interpreted in these clauses as the Governor without the consent of his Executive Council, the Queen's Representative would remain responsible for some important aspect of native policy.[4] Moreover, Colonial Office experience of responsible government had been short, and it was not fully realised how much the Governor would have to depend, even in matters of Imperial interest, on a ministry responsible to the Assembly. But the contemporary experience of the

1. 15 and 16 Vic. cap.72. It had not been intended to exclude Maoris who held individual property from the franchise, but a decision of the Crown Law Officers (C.O.209/152 Bethell and Keating to Newcastle 7 Dec.1859) laid down that only English tenure could be recognised.
2. 15 and 16 Vic.cap.72,sec.71. This power was never exercised.
3. Ibid., sec.73.
4. The only indication that the Governor's power was to be preserved (not necessarily with regard to Maori affairs) was the Parliamentary Under Secretary's insistance that that clause authorising the Governor to obey the Royal Instructions even in opposition to the Council should remain unrepealed. (C.O.209/124 Wynyard to Newcastle 10 Aug.1854. Note by Peel on Merivale's minute).

Canadian Indians must also be taken into account. While there is probably some substance in all these explanations for Colonial Office silence, it seems that the chief reason was the failure to realise the implications of the grant of self-government to New Zealand. As Merivale admitted later, far too little attention was given to the problem of "managing uncivilised nations along with responsible government."[1]

The following year revealed that Grey's precarious tranquillity had broken down. The Maoris around Auckland were restless, and an inter-tribal feud had been smouldering since August 1854 in Taranaki, where, more than anywhere else in New Zealand, European and native settlements were closely intermingled. Gairdner gradually came to perceive the realities of the situation through studying the enclosures to Wynyard's dispatches and contrasting them with the Acting Governor's own comments.[2] It seemed doubtful whether the New Zealand garrison could be reduced from two regiments to one. Gairdner's apprehensions were confirmed when in July and September 1855 the settlers in Taranaki appealed to the Queen for military

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1. C.O.209/135 Gore Brown to Molesworth 14 Feb.1856. Minute by Merivale 30 May 1856. But cp.Merivale's minute on Gore Brown to Grey No.25, 12 Mar.1856 (18 Kuly 1856) "it was well foreseen the problem must soon arise." The first minute, however, seems to represent the true state of affairs
2. See for example, C.O.209/128 Wynyard to Grey No.9,15 Jan. 1855. Minute by Gairdner 30 May 1855. Ibid. Wynyard to Grey No.12, 5 Feb.1855. Minute by Gairdner 3 July 1855.

protection,[1] and when the reports of the new Governor, Colonel Thomas Gore Brown, reached London in 1856.[2] Already both the general and provincial governments had refused to pay for barrack accomodation, and Gore Brown showed that, in the virtual abeyance of the General Assembly, the Provincial Superintendent had engrossed so much executive authority that the Governor himself was unable to compel the civil power to support the military.[3]

The Colonial Office even now considered only the relative liability of imperial and local authorities for military protection and expenditure. The fundamental question of the means of governing and responsibility for the Maoris remained untouched. Merivale, indeed, approached the problem when he advocated bringing the North Island back under Crown Colony rule and giving unstinted military aid.[4] This would avoid encounters between the natives and the settlers themselves, which he regarded as particularly barbarous and demoralising. He believed that it would also allow the Governor to continue to control the Maoris by personal influence as Grey had done. The proposal was consistent with his

1. C.O.209/129 Wynyard to Grey No.43,19 April 1855 and C.O.209/130 Gore Brown to Russell No.5,14 Sept.1855.
2. See for example C.O.209/131 Gore Brown to Russell No.5, 19 Nov.1855. C.O.209/135 Gore Brown to Molesworth 14 Feb.1
3. C.O.209/135 Gore Brown to Molesworth No.15,14 Feb.1856,
4. Ibid. Minute by Merivale 2 June 1856; No.14, 14 Feb.1856. Minute by Merivale 30 May 1856.

opinion of 1840 that, in general, native welfare was safer under imperial direction than under colonial.[1] Although the Imperial Government might lack detailed knowledge, it would also lack the bias of self interest. But Merivale went no further than this general proposition in regard to government. The military aspect of the question was uppermost in his mind. If the constitution were suspended, the colonists could not evade payment by prolonged disputes between general and provincial governments. He proposed alternatively that Imperial assistance should be limited to a single regiment 1000 strong, unless adequate executive power was given to the Governor in the threatened provinces. Ball, supported the second suggestion, quite rightly thinking the first open to insuperable Parliamentary opposition.[2]

Neither of these views, however, appealed to Labouchere.[3] He decided that the two regiments at this time incomplete and numbering about 1300 men, should be retained. Nor would he assent to the War Office demand that New Zealand should contribute the pay and allowances of all but 1000 officers and men, as well as the cost of barracks. He wished the colony to be liable only for accomodation for the number of troops exceeding

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1. Merivale, Lectures on Colonies and Colonisation, p.495.
2. C.O.209/135 Gore Brown to Molesworth No.14 and No.15, 14 Feb.1856. Minutes by Ball, 31 May and 19 June 1856.
3. C.O.209/135 Gore Brown to Molesworth No.15, 14 Feb.1856. Minute by Labouchere 24 June 1856; Ibid.Browne to Labouchere 15 April 1856. Minute by Labouchere 28 Aug.1856.

1000; but finally met War Office opinion to the extent of asking the colony to pay for the maintenance and repair of existing barracks and the building of new ones.[1] He repudiated the opinion of his predecessor, Molesworth, who during his brief term of office advocated the strict application of the principle that self government must involve self-defence. Molesworth had sincerely believed that the settlers fomented disturbances to secure commissariat expenditure.[2] This belief coloured the ideas of all the members of the Office to a greater or lesser degree, although it was probably true only of a minority of colonists.[3] Labouchere remained comparatively unaffected by it, and in practice admitted that Britain owed a greater duty of internal protection to New Zealand than to other responsibly-governed colonies.

In the meantime the Governor, entirely on his own initiative, had declared that the Imperial authorities continued to be responsible for Maori affairs.[4] When the new system of government finally became operative in March 1856, he announced that he would consult his

1. C.O.209/140 Munday to Merivale 19 July 1856. Ibid.Peel to Ball 11 Oct.1856. Draft.
2. C.O.209/129 Wynyard to Grey 19 Apl.1855. Minute by Molesworth 29 Sept.1855. For the most famous expression of his views see Hansard, 3rd.series, Vol.CXV, cols. 1364 -1405 (10 Apl.185
3. Harrop, England and the Maori Wars, p.46. For a New Zealand defence against the charge, see W.Fox, The War in New Zealand, (1866) pp.13,14.
4. C.O.209/135 Gore Brown to Grey No.25, 12 March 1856.

advisers on native as on other Imperial matters, but that he would make the final decisions himself. He would also remain in charge of the Native and Land Purchase department. Three months later Gore Brown modified this arrangement slightly, giving his Councillors fuller information to enable them to expound policy when requesting supplies for native purposes, and allowing correspondence to pass through the hands of a responsible minister styled the Minister for Native Affairs.[1] But his determination to protect the Maoris from rule by an Assembly of Settlers remained unchanged, although, as we have seen, he was normally inclined to bow to the will of his council.[2]

For the first time Merivale faced the problem of responsibility squarely, and opposed the division of authority between Governor and ministers. Instead, he advocated handing native affairs completely over to the colonists.[3] His opposition to Gore Brown was based on distrust of compromise and was not inconsistent with his earlier proposal to revert to Crown Colony government.

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1. C.O.209/137 Gore Brown to Labouchere No.94, 21 Sept.1856.

2. See Chapter III above, pp.110,114.

3. C.O.209/135 Gore Brown to Grey, No.25,12 March 1856. Minute by Merivale 18 July 1856. Ibid.Gore Brown to Merivale (Private) 29 April 1856. Minute by Merivale 28 August 1856. See also Merivale, op.cit.,pp.514-518.

He did not deny that full Imperial control might not be best for the native race, but, failing this, he thought that authority must be given wholly to the settlers. He hoped their need for peace and security would ensure a wise policy, although he was not entirely confident of this result.[1] But he genuinely believed it was not possible to maintain Colonial Office authority against the wishes of a responsibly governed colony, and in these circumstances felt the Home Authorities were not morally bound to watch over native interests. In the case of New Zealand, where the settlers' interests were so closely involved in policy towards the Maoris, he shrewdly suspected that, although Gore Brown's present ministers might acquiesce in dual government, their successors were not likely to do so.

Merivale made these views clear from the outset, but two considerations prevented him from pressing them as strongly as he might have done. In the first place, responsible government in New Zealand meant government by a ministry responsible to the General Assembly, and it was not yet clear whether the General Government was going to be able to assert effective powers over the provincial authorities.[2] Secondly, even if the General Government

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1. Merivale, op.cit., pp.518-520.
2. C.O.209/136 Browne to Labouchere No.47, 9 May 1856. Minute by Merivale 4 October 1856.

became supreme it was bound to contain a certain number of members from the South Island, ignorant of and uninterested in Maori affairs.[1] But his general opinions did not alter and were constantly expounded until his appointment to the Indian Office in March 1860.

Labouchere was temperamentally adverse to drastic decision, and accepted Gore Brown's proposal, supported as it was by the greater body of missionary and other expert opinion in New Zealand, rather than Merivale's advice.[2] Primarily interested in the military aspect, the Secretary of State probably also considered that it was unlikely that the War Office would at this time have approved of a considerable military force unless Maori policy were under the direction of an Imperial Officer. But, while consenting to dual government, he enjoined the Governor "to consult freely" with his council so that Imperial responsibility might be supportedby colonial co-operation.

The members of the New Zealand Assembly acquiesced in the broad principle, but, when the Maori King movement and the land leagues became more prominent and the need for some sort of government more acute, they tended to place their own interpretation upon it. This was natural,

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1. C.O.209/141 Brown to Labouchere No.41, 11 May 1857. Minute by Merivale 10 March 1858.
2. C.O.201/136 Gore Brown to Labouchere No.61, 2 June 1856. Minute by Labouchere 10 Nov.1856. Draft Labouchere to Gore Brown No.90, Nov.1856. C.O.209/138 Gore Brown to Labouchere No.72, 23 July 1856. Encl.Report containing the opinion of the most prominent missionaries and officers of the Native and Land Purchase Department. (Selwyn, Hadfield, McLean and Nugent, for example).

since they voted all funds for native affairs, apart from the £7,000 a year set aside in the Constitution Act. Thus the Native Reserves Acts of 1856 provided that regulations for administering the reserves should be made by the Governor and the Executive Council, not by the Governor responsible to the Colonial Office alone.[1] The reserves were to consist of land purchased by the Government and sold for the benefit of the Maoris or set aside for maintaining churches, schools or hospitals, or of land voluntarily conveyed by the Maoris to the Governor for these purposes. The Act was never put into operation in New Zealand, but it may be regarded as the first of a series of attempts by the colonists to secure the direction of native policy.

Ball saw it in this light, and urged Labouchere to "make a stand" against colonial encroachment on Maori affairs.[2] Although earlier he had inclined to Merivale's view,[3] he felt strongly that it ought not to be allowed while so large an Imperial force remained in New Zealand. He did not wish to perpetuate the control of the Home Government for the sake of the Maoris, but to make a proper colonial contribution to military expenditure the price of its surrender. The Secretary of State,

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1. C.O.209/137 Gore Brown to Labouchere No.88,26 Aug.1856.
2. C.O.323/84 Murdoch and Rogers to Merivale 16 April 1857. Minute by Ball 22 April 1857.
3. C.O.209/137 Gore Brown to Labouchere No.88,26 Aug.1856. Memorandum by Ball, 27 February 1857.

however, accepted Gore Brown's assurance, supported by the opinion of the Land and Emigration commissioners,[1] that the Act was wise in itself and that the Governor would in fact be able to maintain his discretionary powers in administering it. He assented to the Act in December 1857.[2]

The effect of this compromise on responsibility was seen in the following year when three further measures, the Native Districts Act, the Native Circuit Courts Act and the Native Territorial Rights Act were passed in New Zealand.[3] All three contained the same provision, regarding the Executive Council as the Reserves Act, and the policy of allowing ministers to share in the administration of local acts was in general confirmed.[4] The Colonial Office and the Governor alike approved the comprehensive effort to bring the Maoris into contact with British institutions, although they realised it was neither so new nor so disinterested as the Stafford Ministry claimed. Rogers, at this time one of the Land and Emigration commissioners and Legal Adviser to the Colonial Office, recommended that the

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1. C.O.323/84 Murdoch and Rogers to Merivale 16 April 1857.
2. C.O.209/137 Gore Brown to Labouchere 26 August 1856.
   Draft Labouchere to Gore Brown No.86,16 Dec.1857.
3. C.O.209/146 Gore Brown to Lytton, No.79,14 Sept.1858.
4. C.O.323/89 Murdoch and Rogers to Merivale March 1859.
   Draft Carnarvon to Gore Brown No.34, 18 May 1859.

Crown should be given the right to veto the regulations made by the Governor and ministers for native districts and so retain at least a negative power to protect the Maoris. Apart from this, he advised that the first two acts should be confirmed.

The third Act, however, affected Native policy more seriously, since it involved the vital question of land titles and purchase. It gave the Governor and Council power to issue certificates of ownership of tracts to tribes or communities whose claims they considered just.[1] Further, it invaded the government's right of pre-emption by proposing to grant Crown titles, alienable in the normal way, to Maoris who could prove individual ownership of land. Here again the grants were to be made by the Governor in Council, and the ministers would possess the real decision on the matter most likely to involve bloodshed. Roger's report consisted of arguments against this tranfer, especially vigorous as a result of the Minister's concurrent demand for entire control over native affairs. He did not see the act as an attempt to remove "the communistic habits of the Natives" which were "the greatest bar to civilisation", as the ministers alleged. He thought it an effort to make it easier for Europeans to buy land, and declared that the Council

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1. Hitherto the government had not pronounced upon ownership of land except in preparation for purchase.

would not be over careful to ensure that the recipients of titles were the real owners, provided that they showed a disposition to sell. He echoed Gove Brown's warning that the Maoris distrusted the settlers in land dealings, as much as they trusted the Queen. He was careful to stress the minister's expressed wish for a greater military and naval support, and to pass over their statement that they assumed the colony would remain "practically destitute" of force. He contrived to present Carnarvon with the single issue whether Imperial troops would enforce a ministerial decision resisted by the natives, or whether the Government should fall into contempt by abandoning its decision in face of Maori opposition.

The possibility of dispute weighed very heavily with Carnarvon when, in Lytton's absence, he decided to veto the Act.[1] The Conservatives were not unsympathetic towards the settler's claims for protection. Stanley had followed Labouchere in threatening to withdraw the troops if barracks were not paid for, but also followed him in refusing to name any definite date for withdrawal.[2] Lytton vehemently echoed Merivale's argument that a garrison of 2,000 and physical security for the colonists

1. C.O.323/89 Murdoch and Rogers to Merivale March 1859. Minute by Carnarvon 7 May 1859.
2. C.O.209/149 Storks to Merivale 21 Feb.1858. Minute by Stanley 2 March 1858.

would bring the Mother Country a reward in a share in their consequent prosperity, and was moreunwilling than the permanent under-Secretary to recognise this as an impossibility during the present state of Parliamentary opinion.[1] Carnarvon inclined to his superior's views. But the War Office decided in 1853 that the Indian situation made it essential to withdraw the 58th regiment, which would leave at the most 1000 men in the colony.[2] The Admiralty promise of a naval vessel in New Zealand waters would not compensate for the loss.[3] Carnarvon therefore spent no time upon the merits of the act but made his decision on the ground of safety urged in the Legal Adviser's report.

This report marked the beginning of Rogers' great influence upon Colonial Office policy towards the Maoris. His arguments against military expenditure were entirely sincere, but his opposition to the act was almost equally the outcome of a sense of humanitarian responsibility to the welfare of the native race. He felt that Imperial control should last until education had fitted the Maori to take a more equal place in the community. He was readier than Merivale to devise plans to solve the problem.

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1. C.O.209/145 Gore Brown to Stanley No.21,26 June 1858. Minute by Lytton 23 Oct.1858. Ibid. Gore Brown to Labouchere No.14, 25 Feb.1858. Minute by Merivale18 May 1858.
2. Ibid. No.6, 23 Jan.1858. Minute by Stanley April 1858.
3. C.O.209/148 Romaine to Elliot 7 December 1858.

In general he thought that Maoris districts should be administered according to Native Law under the supervision of the Governor alone, whilst at the sametime, leading Maoris should be associated with such bodies as committees of the legislature.[1] In this way the race would be saved from exploitation by the Assembly, yet would not be deprived of contact with the settler's government. Moreover, the prestige and authority of the chiefs would be indirectly fostered and the breakdown of tribal authority arrested. Rogers often underestimated the difficulties of the task of governing the Maoris, but no subject aroused his interest more deeply during his administration.

When Palmerston's government came into office in June 1859 he found an ally in Fortescue. The latter's views were no longer tentative, as they had been during his first period of office. As a dependent people, the Maoris claimed his sympathy, while they offered a sphere of government over which he felt the Imperial authorities might justly claim control. Although his ability, knowledge and experience were inferior to Rogers', both contributed much to the new atmosphere of constructive interest in Maori affairs which appeared in the Office after 1858. Newcastle almost invariably agreed with the views of

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1. See for example C.O.209/155 No.83 Gore Brown to Newcastle 28 August 1860. Minutes by Rogers 21 and 24 November 1860.

his Under-Secretaries. They gave even more weight than their predecessors to the importance of cutting down Imperial military expenditure, but they perceived more acutely that, as far as New Zealand was concerned, it must depend ultimately on Maori confidence in European justice.

This new spirit was urgently demanded by the gravity of the situation in New Zealand. It may be said, indeed, that the spirit was partly the outcome of the more detailed information reaching the Colonial Office as relations between the races deteriorated. On the one hand the settler's dissatisfaction with the speed and method of land purchase was increasing, so that the Governor could write:

> "it cannot be concealed that neither law nor equity will prevent the occupation of native land by Europeans when the latter are strong enough to defy both the native owners and the government, as will be the case ere long." 1

On the other hand Gore Brown was at last alive to the importance of the Maori King movement.[2] Although it had originated in part to supply law and order upon the disintegration of the tribal system when no European government replaced it, in part to try to restore the dwindling authority of the chiefs, it had

1. C.O.209/151 Gore Brown to Newcastle No.80,20 Sept.1859.
2. C.O.209/153 Drury to Fortescue (Private). See minute by Gairdner, referring to a private letter from Gore Brown, which admits that until this time he had underestimated the strength of the movement.

now become the embodiment of resistance to land selling and of Maori national feeling. It was no longer possible to believe that movement would die if consistently ignored by the Government.

To combat these dangers the Governor proposed that a permanent Native Council should be appointed under Imperial authority to administer a new system of land purchase.[1] The Crown's right of pre-emption was to remain, except in areas where European and Maori population were already intermingled. Here a native, if he could prove his individual ownership, might be granted an alienable Crown title, - a course which the Governor had previously opposed. Elsewhere the Maoris were to be induced to sell their land by the promise that two tenths should be set aside under inalienable Crown title for their maintenance and one tenth as a public reserve to supply welfare services. Gore Brown hoped that the Maoris would have confidence in a permanent council which represented the Queen rather than the settlers, although he very tentatively proposed that his ministers should be allowed to nominate two members.[2] With equally misplaced optimism, he hoped that the settlers would be reconciled to an Imperial Act by the prospect of

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1. C.O.209/151 Gore Brown to Newcastle No.80, 20 Sept.1859.
2. Of those who advised the Governor in the preparation of the scheme, only Sewell was in favour of this proposal. McLean, Bishop Selwyn and Swainson opposed it.

acquiring more land.

The Governor infected the Colonial Office with his sense of urgency. If a permanent Council were set up under Imperial authority, it would tend to perpetuate, and even to increase the Home Government's responsibility for the Maoris, and to make the division in the colony between local and native affairs more rigid. Gore Brown's ministers were openly hostile to the plan. Yet even Merivale could see no other alternative,[1] and the effort which Rogers made[2] to combat the permanent Under Secretary's usual views was largely unnecessary.

The Imperial bill was drafted by Rogers and embodied his ideas. It did not include provision for granting alienable Crown titles, but in other respects conformed to the Governor's suggestions regarding land purchase. The Council's functions were not to be limited to this,however, but to extend to government of native districts to be withdrawn from colonial jurisdiction, under section 71 of the Colonial Act. At the same time in his report, Rogers stressed that the powers were not to be used to create a permanent society never to be brought under British Law. The

1. C.O.209/158 Murdoch and Rogers to Merivale, 1 Feb.1860. Minute by Merivale 6 Feb.1860.
2. Marindin, op.cit.,p.223. Rogers to Miss Rogers 14 Feb.1860.

natives must also be drawn into the economic life of the community, not isolated from it by an over generous reservation of land. As far as the settlers were concerned, he felt that the Council could not avoid financial dependence upon the Assembly. To secure co-operation and reconcile the legislature to the Imperial act, he suggested that the Home Government should give the Council public instructions to purchase land as speedily as possible, and to leave the colonisation of newly bought districts entirely to the local authorities.

Fortescue welcomed the plan. He was optimistic over its probable reception in New Zealand, and equally ready to minimise the difficulty of piloting it through Parliament.[1] Newcastle introduced the Bill into the House of Lords on 3 July 1860, but the criticism which it encountered, especially from Lord Lyttleton, a patron of the Canterbury settlement, provided a warning of the attitude of the Commons.[2] Adderley, supported by many New Zealanders then in England, attacked it as a breach of the principles of responsible government and persuaded Pakington to prepare to lead the opposition.[3]

Palmerston had promised Fortescue that he would persevere

1. C.O.209/158 Murdoch and Rogers to Merivale 1 Feb.1860. Minute by Fortescue 9 February 1860.
2. Hansard,3rd.series,Vol.clix, cols.1329,1518-9. Vol.clx,cols. 418/23.
3. Ibid., vol.clx, cols.1639-40. Letters J.R.Godley to C.B. Adderley 23 November 1860, p.296.

with the bill[1], but it was near the close of a stormy session during which the Anglo-French treaty defence and the Lords's rejection of the Paper Duties Repeal bill had caused divisions among the Liberals and even in the cabinet itself. As Disraeli remarked ..."the existence of the Government in its integrity has been in daily danger".[2] In consequence it was not prepared to pursue an unpopular measure and the bill was withdrawn before its second reading.

The fate of the Bill made it certain that the Colonial Office would not again attempt to solve the problem by curtailing colonial self-government by Imperial legislation. It is most improbable,however, that the Council would have met with any success. To obtain financial supplies from the Assembly it would have had to prove itself immediately an efficient instrument for buying land. But a speedy increase in land sales was impossible, since the Maori land leagues were inspired by suspicion and fear of Europeans, not merely of the colonial government and Assembly. If a Council had been established at the time of the Constitution Act with ample funds reserved

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1. Marindin, op.cit.,p.229.
2. Buckle, op.cit.,Vol.IV,p.281.Disraeli to Mrs.Brydges Williams 23 July 1860.

to it in the civil list, it might conceivably have proved effective. In 1860 it was far too late for such an expedient, both because of the settlers' jealousy of any government but their own, and because of the Maoris fear for their nationality. The outbreak of the Taranaki war in March 1860 dealt a final blow to the hope that the natives would place any confidence in the Governor.

The Colonial Office supported Gore Brown's refusal to allow the opposition of Wiremu Kingi to prevent Teira's sale of the Waitara block.[1] Newcastle and Fortescue based their approval chiefly upon Gore Brown's record of interest in and care for the Maoris. They might doubt that he had exercised his usual caution, but they felt he would not have been led into any act of injustice. Rogers attempted to analyse the merits of the case.[2] While admitting that a satisfactory judgement on Maori land law could not be made in England, he though that Wiremu Kingi had no legal right of chieftainship which would entitle him to forbid the sale. Therefore, he was trying to impose upon his fellow Maoris the wish of a runanga which had no right to compel their obedience. In opposing him,

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1. See for example C.O.209/153 No.21, Gore Brown to Newcastle 27 Feb.1860. Minute by Rogers 7 May 1860. C.O.209/154 Gore Brown to Newcastle No.64, 25 June 1860. Minutes by Elliot 21 Sept.1860 and Fortescue 24 Sept.1860.

2. C.O.209/155 Gore Brown to Newcastle No.96, 4 Sept.1860. Minute by Rogers 24 Nov.1860.

the Government was both protecting the Maoris and resisting a claim to sovereignty which conflicted with the Queen's. But Rogers felt that the Government's case was weakened, since earlier Wiremu Kingi's pretensions to chieftainship had been both explicitly and implicitly recognised. He rather unhappily concluded that the war could in reality be justified only because it was now inexpedient, even dangerous, to recognise a claim which had hitherto been allowed. But the general confidence of the Imperial Government was shown by the immediate dispatch of a regiment, and by the end of the Taranaki war in March 1861 there were more than 6000 troops in New Zealand.[1]

Notwithstanding this support from home, Gore Brown's position became increasingly difficult. There is no doubt that he believed that his course was inevitable if British sovereignty were to be upheld. In the eyes of Maori sympathisers, however, he had at length surrendered to land-hungry settlers, and, sensitive as he was,[2] the need to justify himself drove him into ever closer association with the policy

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1. C.O.209/166 Lugard to Elliot 21 July 1861. Hansard, 3rd Series, Vol.CLXV, col.144.
2. W.Gisborne, New Zealand Rulers and Statesmen, p. 97.

of the ministers and assembly. It was probably this state of mind which led him to recommend that the royal assent should be given to the New Zealand Act of November 1860 for setting up a Native Council.[1] He could hardly have failed to perceive that the effect of the Act was to hand over Maori affairs to the ministers, since, although the Crown was to nominate five members, the power of the Council was virtually limited to giving advice when the ministers requested it. He must have felt that, in fact, control now rested in the hands of his ministry, and, consciously or unconsciously, have seized on the act as an escape from his nominal responsibility.

The Colonial Office unhesitatingly rejected the act as a "mere feeding of the Home Government with words and despoiling it of power".[2] At this time, however, the rejection was the result of fear of Maori reaction to a change of authority rather than to distrust of colonial intentions . Despite the war, the general record of the administration and the debates in the Legislative Council and Assembly seemed to indicate a genuine wish for the good government of the natives. Moreover, the detailed report of

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1. C.O.209/156 Browne to Newcastle No.120,26 Nov.1860.
2. Ibid. Minute by Rogers 13 Feb.1860.

Fenton's attempt to establish judicial institutions among the Waikato tribes in 1857-1858 now reached London for the first time. Although he had not tried to use the chiefs as instruments of Government as Fortescue and Rogers though wise, the report had perhaps the greatest influence in convincing the members of the Office that the ministry had made a real effort to end the prevailing anarchy. Newcastle admitted that the Maoris might be better treated under the act, but he agreed that this would be a singularly inopportune moment for the transfer of power and "would raise the whole of the tribes in armed opposition to our rule." 1

Neither Rogers nor Fortescue, however, was content merely to refuse to confirm the bill. Each set himself to devise a modification, investing the Native Council with executive and legislative power on the lines of the Imperial Bill of 1860.[2] Once again the essential feature was to be the withdrawal of native districts from colonial jurisdiction, and their supervision by the Council. Both intended to compel the colonists to pass acts giving effect to the new plan, and to provide financial resources, by

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1. C.O.209/156 Gore Brown to Newcastle No.120,26 Nov.1860. Minute by Newcastle 23 February 1860.

2. Ibid. Minutes by Rogers, 13 Feb. and 21 March 1860; by Fortescue 12 March 1860.

giving to it an Imperial grant of about £5000 a year for some years.

Fortescue's plan had the defect of increasing the division of authority between the Governor and ministers.[1] The native and land purchase department was to be handed over to the ministry, and the Assembly was to be given the right to veto regulations made by the Governor and Native Council for the native districts. Such a situation would have invited deadlock. Rogers, on the other hand, intended to concentrate all executive power, and all legislative power over the native districts in the hands of the Governor and Native Council, while the Assembly's existing financial power would in practice be curtailed by the conditions of military aid.[2] The Council's authority would, moreover, rest not merely upon a colonial act, but upon Letter Patent delegating to it the powers given to the Governor by section 71 of the Constitution Act. He conceded only that a member of the ministry should be included in the Council. He knew how distasteful Imperial dictation

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1. C.O.209/156 Gore Brown to Newcastle, No.120,26 Nov.1860. Minute by Fortescue, 12 March 1860.
2. Ibid. Minute by Rogers 21 March 1860.

would be to the assembly. and he planned to make the administration of Maori affairs as far as possible independent of its co-operation.

Newcastle acceped this scheme in preference to Fortescue's more confused proposal. Rogers had, however, over-estimated the powers which could be conferred by Letters Patent. The Crown Law Officers declared that it would not be possible to appoint a Native Council by this means, nor could the Governor legislate effectively for native districts, for section 71 of the Constitution Act authorised him only to declare existing native law, not to amend it. By this time, however, Sir George Grey's offer to undertake the Governorship of New Zealand had been received and accepted,[1] and Colonial Office efforts to enforce methods of government for the Maori people came to an end.

The instructions given to Grey allowed him the greatest possible freedom of action.[2] Fortescue in drafting them laid down only the most general objects of the Imperial Government: the establishment of peace and of civil government over the whole Maori race. The conditions of peace, the relations between

1. See Harrop, op.cit., p.131.
2. C.O.209/156 Gore Brown to Newcastle 26 Nov.1860.
   Draft Newcastle to Grey (written by Fortescue)
   5 June 1861.

Governor and ministers, and the future mode of administration and land purchase, were left to Grey. Colonial Office suggestions as to the means were tentative in the extreme. It was merely suggested that his dealings with the natives of Kaffraria might proye a suitable pattern to work on, and the rule of the Maoris according to their own custom was pressed as a better alternative than the "fictitious uniformity of law". The one condition imposed was that, whatever system Grey adopted, Imperial troops must not be used unless the Governor had personally consented to every measure of the local government.

Grey's temperament and record made such broad terms of reference almost inevitable. But they underlined the unshaken confidence which Newcastle had already shown in him by reversing Lytton's decision to recall him from South Africa.[1] It was true that both the Colonial Secretary and Fortescue warned him of the difficulties he would encounter in dealing with the New Zealand politicians.[2] Nevertheless it is clear that they had implicit faith in his benevolence towards the Maoris and in his ab#ility to command their trust. Nothing showed this more clearly than

1. See Marais, op.cit, pp.247 ff. C.W.de Kiewiet, British Colonial Policy and the South African Republics, pp.128.ff.
2. J.Martineau, Life of the Duke of Newcastle, p.322. Grey Papers, Fortescue to Grey 5 June 1861.

the tone of the minutes on Gore Brown's despatches after the decision to recall him. One of the most serious problems of the time, for instance, was the mode of dealing with the Waikato tribes. Some had fought at Taranaki and had returned to their inaccessible country when the truce was concluded. The Governor had refused General Cameron's wish to embark on an immediate primitive expedition into the Waikato. But he was determined to exact a verbal submission to the Queen and repudiation of the Maori King, whether they had been engaged in the war or not. To the Colonial Office this policy seemed unjust, since it made an issue of an abstract idea, and one likely to be misunderstood by "untutored savages".[1] It was a very different matter from the specific defiance at the Waitara sale. The policy was also inexpedient, and appeared likely to lead to a war of extermination. Rogers had been at pains to expound his alternative of waiving present surrender and attempting to foster a real loyalty to the Queen through good government. Yet he wrote "the necessity of considering these questions is superseded by the appointment of Sir G.Grey." Like Grey himself, the

1. C.O.209/162 Gore Brown to Newcastle No.74, 16 May 1861. Minutes by Rogers, 22 August, by Fortescue 26 August and Newcastle 30 August 1861.

members of the Colonial Office failed to realise how greatly Maori sentiment had changed since 1853.

This confidence goes far to explain why the Office did not oppose Grey's handing over Maori affairs to his ministers in November 1861.[1] The members were not surprised and accepted the decision as inevitable.[2] Rogers betrayed no enthusiasm, but he was, like Fortescue and Newcastle, aware that during the previous year Gore Brown's power had been purely nominal.[3] It seemed that Grey's personal influence over his ministers offered a greater hope of controlling Maori policy than any attempt to reassert constitutional independence. Moreover, the presence of British troops ensured that Imperial wishes should not be entirely disregarded. These were the most important considerations to the Colonial Office, but the question of military expenditure also played a part. In 1860 Richmond, the minister for Native Affairs, had declared that, on account of the Governor's special position, the Maori war was an Imperial war, and Great Britain ought to pay not only for all the regular troops, but also for the local

1. C.O.209/165 No.36 Grey to Newcastle 30 Nov.1861.
2. See for example C.O.209/164 Grey to Newcastle 9 Oct. 1861. Marginal note by Rogers: "Sir G.Grey will find management of native affairs finally handed over to the colonists."
3. C.O.209/165 Grey to Newcastle 30 Nov.1861. Minute by Rogers 20 February 1862.

militia and volunteers.[1] The concession would remove the basis of such extravagant claims, and provide a reason for demanding greater financial and military effort from the colony.

But the transfer of power was not so great an evasion of New Zealand's difficulties as subsequent colonial opinion alleged. The Colonial Office did not hope for any immediate relief from the burden of defence; on the contrary, it assumed additional financial liabilities. Although Labouchere and Stanley had failed to induce the colonists to pay for barrack accomodation, in September 1858 the ministers had offered instead to contribute £5 a year for each soldier in the colony.[2] The War Office hesitated, first because such a contribution would amount to much less than the cost of barracks when only one regiment was concerned, then because it waited for the report of the departmental committee of 1859 before deciding. Finally, the offer was accepted in 1860.[3] But now, before the arrangement had come into force, the Colonial Office agreed to forego the contribution. Instead

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1. C.O.209/155 Gore Brown to Newcastle No.100, 29 Sept. 1860. Encl.
2. C.O.209/154 Gore Brown to Lytton No.76, 9 Sept.1858. Encl.Memorandum 8 Sept.1858.
3. C.O.209/158 War Office to Treasury 26 March 1859. C.O.406/17 Cornewall-Lewis to Gore Brown 12 Sept.1860.

the sum was to be devoted to native purposes.[1]

Rogers was most eager in urging the sacrifice of £25,000 a year, so that Grey's plans for reorganising the native department and establishing a civil commissioner with native magistrates and police to assist him in each Maori district might be implemented. He was "always of the opinion that it is better for the Imperial Government to contribute to the education of natives than to furnish troops to control them." [2]

He felt that it would be "little short of madness" to hinder Grey's intentions, "in order to reduce Imperial payments".[3] But Fortescue and Newcastle were little less willing. They decided that for three years the sum due to the Imperial Government should be spent on native purposes, provided that the colonial legislature should vote an equal amount. By upholding Grey's high-handed action in committing the Treasury's reluctance,[4] the members of the Office showed that their concern for Maori welfare was not diminished, although responsibility now rested with the Colonists.

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1. C.O.209/165 Grey to Newcastle No.36, 30 Nov.1861. Minutes by Rogers 20 Feb.1862, Fortescue 21 Feb.1862 and Newcastle 22 Feb.1862. Draft Newcastle to Grey 26 May 1862.
2. Ibid. Minutes by Rogers 20 February 1862.
3. C.O.209/168 Grey to Newcastle No.26, 8 March 1862. Minute by Rogers 14 May 1862.
4. C.O.209/165 Grey to Newcastle No.36, 30 Nov.1861. Draft letter from Treasury to the Colonial Office, Minutes by Rogers 6 May 1862 and Fortescue 10 May 1862.

The New Zealanders' attempt to refuse the concession of responsibility[1] provoked Newcastle's well known dispatch repudiating the "duty of Great Britain to educate, civilise and govern any savages among whom British subjects chose to plant themselves".[2] It carried the plain warning that Imperial military forces would shortly be reduced, although not completely withdrawn. This dispatch was fully in accord with the Imperial policy of reducing military garrisons. As far as Imperial obligation to the Maoris was concerned, however, it seemed to contradict the interpretation put upon the Treaty of Waitangi by the Colonial Office in earlier days, and by the writer, Rogers, up to the present time.[3] But the dispatch was written with the deliberate intention of convincing the New Zealand Assembly that the Imperial Government was in earnest in requiring increased military and financial exertion from the settlers. It was also designed to impress upon them that they could not count upon military aid for a war caused through an

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1. C.O.209/169 Grey to Newcastle; No.89, 26 August 1862; No.93, 13 Sept.1862; No.98,4 Oct.1862; No.1 0, 10 Oct. 1862; No.103, 24 Oct.1862.
2. Ibid. Grey to Newcastle No.98,4 Oct.1862.Minute by Rogers 17 Jan.1863. Draft Newcastle to Grey No.22, 26 Feb.1863.
3. Fortescue did not write the draft, as Harrop states (p.161

unwise native policy. It was concerned to show that the Taranaki war, if its immediate cause was Governor Brown's action was, in reality, the result of a purely colonial policy.[1] The tone, if not the substance, was dictated by the extreme irritation felt by Newcastle, Fortescue and Rogers at what they considered an effort to avoid expense and responsibility while increasing practical power.[2] The refusal of the ministers to guarantee repayment of the sums advanced from the Treasury chest for local forces, followed by the report of "so disgraceful a state of things" as New Zealand's dispensing with even the training of the militia., had led the Office to look upon the struggles and apprehensions of the colonists with little sympathy.[3]

The refusal of the Colonial Office to return to the system of Imperial responsibility was underlined when it confirmed the Native Land Act of 1862, which

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1. Rogers made some attempt to prevent the dispatch "reading like an essay" (see note on his minute) but he would have agreed with Rusden's opinion that it was "as long as an evening lecture" (G.W.Rusden, History of New Zealand, Vol.11, p.169.)
2. C.O.209/169 Newcastle No.89,26 Aug.1862. Minutes by Rogers 29 Dec.1862, Fortescue 1 Jan.1863,Newcastle 4 Jan.1863. Ibid.No.100,10 Oct.1862. Minutes by Rogers 2 Feb.1863, Fortescue 12 Feb.1863 and Newcastle 17 Feb.1863.
3. C.O.209/188 Gore Brown to Newcastle No.100, 29 Sept.1860. C.O.209/166 Lugard to Rogers 12 April 1862 and 24 July 1862. Minutes by Rogers 25 July,by Fortescue 26 July 1862 and Newcastle (undated).

abolished the Crown's right of pre-emption in certain circumstances.[1] It is true that the members of the Office were by this time aware of the growing conviction in New Zealand that, in spite of its original advantages, the right was now proving harmful to the natives.[2] It identified the government in their eyes solely with land purchase. Further, when they did wish to sell they bitterly resented being compelled to accept the low price offered by the government, knowing that their land was re-sold for considerable sums. Fortescue and Rogers were to a certain extent convinced of the soundness of these arguments.[3] But their real reason for assenting to the Act was their belief that now they should not allow traditional Imperial principles to hinder colonial control of native affairs. In the same way a slight, but significant, change in Rogers' mode of dealing with native acts appeared at this time. He considered that an amendment to the Native Reserves Act of 1856 was wrong in principle.[4] Yet he felt that the

1. C.O.209/170 Grey to Newcastle No.113, 5 Nov.1862. Draft Newcastle to Grey No.17, 26 Feb.1863.
2. See for example C.O.209/168 Grey to Newcastle No.59, 10 June 1862. Encl. Report of J.E.Gorst.
3. C.O.209/167 Grey to Newcastle No.4, 8 Jan.1862. Minutes by Rogers 18 March, Fortescue 20 March 1862. C.O.209/168 Grey to Newcastle No.89, 9 April 1862. Minutes by Rogers 10 June, Fortescue 14 June, Newcastle 15 June 1862. C.O.209/170 Grey to Newcastle No.113, 5 Nov.1862. Minutes by Rogers (undated), Fortescue 12 Feb., Newcastle 18 Feb.1862.
4. C.O.209/170 Grey to Newcastle No.113, 5 Nov.1862. Minute by Rogers (undated).

Secretary of State no longer had the right to demand revision of the act.

On the other hand, an example of the practical control still exercised occurred when, in December 1862, it was learned that the ministers intended to seize native land near New Plymouth in order to make roads.[1] Fortescue and Newcastle agreed that they could not prohibit a proceeding which they felt to be most unwise in view of the disturbed state of New Zealand. What could be done, and what was done, was to forbid Imperial tropps to be used in a war arising out of such an action.

Apart from this occasion, when the Governor's opinion appeared to incline towards his ministers' policy, Grey's doings continued to receive the approval of the Colonial Office. His intention to build a road on Crown land from Auckland into the Waikato, for example, was warmly applauded.[2] It was as Gorst pointed out, a mistaken policy, since it convinced the chiefs that Grey was determined to crush them notwithstanding his declaration of friendship.[3] But it was natural that the Office, not fully realising local circumstances, should feel that improved communications would help the spread

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1. C.O.209/170 Grey to Newcastle No.130, 18 Dec.1862. Draft Newcastle to Grey No.3 , 22 March 1863.
2. C.O.209/167 Grey to Newcastle, No.2, 7 Jan.1862. Minutes by Rogers 18 March 1862, Fortescue 17 March 1862, Newcastle. 19 March 1862.
3. Gorst, New Zealand Revisited, page 184.

of civilising influences. The members occasionally grumbled at the querulous tone of Grey's dispatches and the meagre information he supplied, apparently not adequately supplemented by private letters.[1] Again, Fortescue thought that the terms in which the Governor denounced the injustice of the Waitara purchase were too comprehensive.[2] But these were comparatively minor complaints, unimportant in the light of Rogers' opinion that Grey was pursuing a "wise, firm and temperate policy".[3] When war broke out with the Waikata, after many reports of a conspiracy against the settlers, the permanent Under Secretary summed up the views the Office when he said that, as far as they could judge, Grey forbore "as long as forbearance was possible." [4]

Once more this attitude of the Office helps to explain the approval which was given to the policy of limited confiscation adopted by the Governor in August 1863.[5]

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1. See for example C.O.209/172 Grey to Newcastle No.5, 6 Feb.1863. Minute by Cox 5 May 1863.
2. C.O.209/173 Grey to Newcastle No.56, 27 May 1863. Draft Newcastle to Grey No.88, 28 August 1868. (Fortescue's draft).
3. C.O.209/172 Grey to Newcastle No.37, 6 April 1863. Minute by Rogers 13 June 1863.
4. C.O.209/174 Grey to Newcastle No.94, 10 August 1863. Minute by Rogers (undated) Draft Newcastle to Grey No.100, 24 Oct.1863.
5. C.O.209/174 Grey to Newcastle No.109, 29 Aug.1863.

Three years earlier Rogers had said that he

> "would deplore above all things making war of this kind a means of enriching the colony by confiscation of land - a precedent which, if once set, would be a dangerous inducement to wars of the same kind." 1

Grey's dispatch countered this objection by representing the policy as an essential step for defence and permanent security. He intended to use the land to establish military settlements as a means of defence against the Waikato and finally to impress upon them that any attempts to expel Europeans from the districts was hopeless. Further, he was convinced that confiscation was the only policy which would deter the Maoris from future wars. These arguments were not without substance, but de Kiewiet's comment upon his policy in South Africa is applicable to New Zealand also : "Grey very largely overlooked the significance to the natives of the secure possession of land." [2] It must be remembered, however, that when he left the Cape the result of his introduction of European settlers into Kaffraria was not fully apparent. Newcastle accepted his arguments in principle while pointing out the need for great restraint in execution.[3] Otherwise

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1. C.O.209/155 Gore Brown to Newcastle No.89, 29 Aug.1860. Minute by Rogers (undated).

2. de Kiewiet, op.cit., p.95.

3. C.O.209/174 Grey to Newcastle No.109, 29 Aug.1863. Minute by Newcastle 19 Nov.1863. Draft Newcastle to Grey 26 March 1864. The need for caution was emphasised by Fortescue in a private letter to Grey on 26 February 1864. (Grey Papers).

the Maoris, thinking it proved that greed for land had in truth been the object of the war, would intensify hostilities which "would be viewed by Her Majesty's Government with the gravest concern and reprehension." Even Rogers acquiesced[1] but he wished to enforce the demand for justice and moderation in carrying out the policy by stating bluntly that Imperial troops would be reduced if a new war resulted.[2]

It is doubtful if this threat would have had greater effect than Newcastle's vague phrase. But Rogers' concern, increased by a memorandum from the premier, Fox, implying that the Maoris could only be dealt with by force,[3] was justified by the sweeping terms of the Confiscation Act.[4] Three features of the act excited his condemnation - the apparently limitless period during which confiscation might be made, that it was to be made under authority of the ministry instead of an independant tribunal, and that the power of compensation was so circumscribed it was inevitable that numbers of the innocent would be punished with the guilty. He characterised as

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1. C.O.209/178 Grey to Newcastle No.10, 6 Jan.1864. Minute by Rogers, admitting confiscation may be regarded as "a legitimate object."
2. C.O.209/174 Grey to Newcastle No.109, 29 Aug.1863. See Newcastle's note on Draft Newcastle to Grey No.113,26 Mar.1864.
3. C.O.209/178 Grey to Newcastle No.9, 6 Jan.1864. Minute by Rogers 8 April 1864.
4. C.O.209/178 Grey to Newcastle No.10,6 Jan.1864.

"the beginning of tyranny" the proposal to take land for settlement from friendly natives with compensation. The spirit of the treaty of Waitangi did not withold the right to take land with compensation for such genuinely public purposes as a road or a post office. But it was a very different matter when that land was to be granted to individuals for settlement, even for so-called military settlement. It would be hard for any authority responsible to the colonists to resist the temptation to embodied in the provision. When the temptations of confiscation were added to this, when the ministry was to determine what lands were to be liable for forfeiture, including those of any native who had

> "assisted or comforted any rebels or shall have counselled any person to rebel"

Rogers thought that the whole race would be driven to despair. The administration of the act should be entrusted to a commission independent of the legislature, which should make careful and public enquiries. It should be made clear that even the guilty would retain on secure tenure enough land to furnish a livelihood, even prosperity. There was genuine feeling for the Maoris underlying Rogers' views. But his consciousness of Imperial interest is also apparent. If the Maoris were not given a reason for preserving peace in the future, large Imperial forces would have to remain in New Zealand,

since he expected - quite rightly - that the military settlements would prove a failure.[1]

The consideration appealed strongly to Cardwell, with his determination to reduce Imperial military commitments. He avoided Rogers' trenchant expressions of suspicion of the settlers, but his dispatch laid down explicitly the conditions which he required the Governor to observe in administering the act.[2] The duration was to be limited to two years, a permanent commission was to enquire into the land to be forfeited, the full extent of the forfeiture was to be made known at once, and Grey's own concurrence was to be essential for every step. Cardwell maintained this attitude when a quarrel developed between Grey and his ministers over the extent of confiscation. The Governor was fully entitled to object to an over large seizure, since

> "Nothing could be more calculated to excite a strong feeling of ... indignation in this country than ... any indiposition of New Zealand to give full effect to a just and generous policy to the native race." 3

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1. See Morrell, Provincial System in New Zealand, pp.235-9.
2. C.O.209/178 Grey to Newcastle No.10, 6 Jan.1864.
   Draft Cardwell to Grey No.43, 26 Apl.1864.
3. C.O.209/181 Grey to Newcastle No.89, 8 June 1864.
   Draft Cardwell to Grey No.85, 20 Aug.1864.

Again, Grey was supported by the Secretary of State in a dispute over the disposal of Maori prisoners, when he contended that they were being kept in unsuitable quarters, and that their imprisonment was increasing the hostility of the tribes.[1] Fox criticised Cardwell's instructions as a departure from Newcastle's policy, and a breach of responsible government.[2] In fact, since the transfer of power the Colonial Office had relied upon the Governor's use of his discretion, supported by the presence of British troops, to moderate the intentions of the Colonial Government. Cardwell himself did no more than take up this position with much vigour. In 1864, however, Grey's continual disputes with the ministry caused the policy to be more openly and frequently enunciated.

Fortescue was in general agreement with Cardwell and Rogers in upholding the Governor's authority in Maori affairs. Nevertheless a definite change was apparent in his attitude. The substance of his comments upon the Confiscation Act, for example, did not differ very greatly from the permanent undersecretary's. But he did

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1. C.O.209/179 No.53 Grey to Newcastle 6 Apl.1864. Draft Cardwell to Grey No 76, 27 June 1864. C.O.209/181 Grey to Newcastle, Separate 6 June 1864. Draft Cardwell to Grey No.98, 26 Sept.1864.
2. C.O.209/192 Grey to Cardwell No.124, 26 Aug.1864. Encl. W.Fox, op.cit., pp.152-157.

not share Rogers' indignation at the "thoroughly bad" act, and he was confident that it would be applied with moderation.[1] He showed impatience with the pro-Maori sentiments of Gorst and Sir William Martin, where Rogers accepted them upon grounds of policy and humanity, although he denied their legal soundness.[2] Again, Fortescue had a good deal of sympathy with the ministry's impatience over the delay in proclaiming the districts to be confiscated. On one occasion he observed "Sir G. Grey now needs to be encouraged to confiscate somewhat boldly."[3] His defence of the settlers in Parliament against the views of those who blamed them entirely for the wars seemed to represent his genuine views.[4]

To some extent this alteration is explained by the transfer of native policy to the colonial government. In all probability without his being aware of it, he ceased to feel the same sympathy for the Maoris when their welfare was not such a direct concern of the Office. Other factors had a greater part. He was impressed by the efforts to protect themselves which the colonists had been making since the autumn of 1863.[5] He was beginning

1. C.O.209/178 Grey to Newcastle No.10, 16 Jan.1864. Minute by Fortescue 16 April 1864.
2. Ibid. No.9, 6 Jan.1864. Minutes by Rogers 8 Apl.1864, Fortescue 16 Apl.1864.
3. C.O.209/185 Grey to Cardwell No.16, 27 Nov.1864. Minute by Fortescue 17 Jan.1864.
4. See for example Hansard, 3rd.series, Vol.clxxv, cols.1510-1516; Vol.clxxiv, cols.1653-1656.
5. In Feb.1864 the Colonial Forces including Militia and volunteers numbered 7806 (C.O.209/179 Grey to Newcastle No.36, 29 Feb.1864).

to lose confidence in Grey. He considered that the Governor, in his anxiety to do justice to the natives, had paid too little attention to upholding the rights of the Crown in his manner of reversing Gore Brown's decision at Waitara. On the outbreak of the Waikato war, the Parliamentary Under Secretary had been even more indignant than Rogers and Newcastle when Grey requested three extra regiments without revealing that the militia and volunteers would not be called out unless a general insurrection ensued. He had wished to recall the reinforcements.[1] He thought that Grey was mismanaging his relations with his advisers:

> "not being able to do what he wished in all respects he has chosen to avoid responsibility by separating himself from his ministers, and negotiation with them in diplomatic fashion rather than endeavouring to guide and influence them in native affairs from day to day ....." [2]

It is probable that Cardwell and Rogers also doubted the wisdom of Grey's attitude to Whitaker and Fox when he authorised the Weld ministry to confiscate very much the same extent of territory which he refused to its predecessor. Under their auspices and those of the Stafford ministry 2,800,000 acres were confiscated in 1864 and 1865.[3] But the question was overshadowed by Weld's

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1. C.O.209/177 Lugard to Rogers 22 Aug.1863. Minute by Fortescue 1 Sept.1863.
2. C.O.209/183 Grey to Cardwal 7 Oct.1864. Minute by Fortescue 21 Dec.1864.
3. C.H.B.E.,Vol.VII, Part II, p.136.

announcing his intention to pursue a "self-reliant" policy and to dispense with Imperial forces.[1] He considered that the war in the Waikato was virtually concluded and operations in Taranaki could be carried on by colonial troops, while the dangers of the rise of Hauhauism were not yet appreciated. The chief reason for his decision was financial.[2] After 1864 the Imperial Government would demand a contribution of £40 for each soldier. Already the offer of an Imperial guarantee for a loan had had to be refused, partly because this payment was one of the conditions. In return for dispensing with British military aid, the ministers demanded that native affairs should be entirely left to the colonists. Although Rogers seemed to have a momentary doubt,[3] like the other members of the Office he agreed and heartily welcomed a policy which coincided so closely with the wishes of the Imperial government.

The new policy and ministry resulted in harmony between Grey and his advisers, but in friction between him and the Colonial Office. The Governor was determined

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1. C.O.209/188 Grey to Cardwell No.13, 7 Jan.1865, and No.3, 5 Jan.1865. Draft Cardwell to Grey 27 Mar.1865.
2. For the financial condition of New Zealand see Morrell, Provincial System in New Zealand, pp.132-9.
3. C.O.209/185 Grey to Cardwell No.180, 7 Dec.1864. Minute by Rogers 17 Feb.1865.

not to allow the removal of the troops until he was confident of the safety of the colony. Despite the re-iterated commands of the Imperial government, 5073 soldiers remained in the colony in August 1866,[1] and the garrison was not reduced to one regiment until 1867. Rogers believed that Grey had two motives in hindering the return of the forces.[2] In the first place their presence gave him a position of authority otherwise unattainable under responsible government. This enabled him to carry out something of his own policy, "the distinction of which he is perhaps excessively ambitious." In the second place, and more important, the Governor felt that ultimately the ministers' policy must lead to war, although he could not always justify his arguments of immediate danger. Yet the result of the detention, the permanent under secretary thought, was to make the ministers more self-seeking and less cautious in their attitude to the Maoris. This judgement was harsh but contained a great deal of truth. The Colonial Office had more trust in the judgement and integrity of the General commanding than in Grey's regarding the withdrawal,

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1. Times, 1 January 1867.

2. C.O.209/200 Grey to Carnarvon No.20, 4 Feb.1867. Minute by Rogers 4 April 1867.

and the necessity and character of the intervening military operations. Early in 1865 Cameron considered the operations in Taranaki and Wanganui to be designed purely for selfish gain. Consequently, Cardwell was ready to recall the Governor, and had even decided upon Sir Henry Storcks as his successor.[1] Grey only saved himself by announcing that he would at once give instructions for the embarkation of the five regiments which the War Office had ordered to return in March and he had detained in May. In November 1865 the Colonial Office commanded him to concentrate the Imperial regiments, which had been withdrawn from outposts and confiscated districts for another year. In December 1866 Carnarvon deprived the Governor of all authority over the Imperial troops, except the one regiment which was to remain conditionally in New Zealand to prevent further delay.[2] In the meantime a new issue had arisen between the Office and the Governor, when in June 1866 he declined to treat a dispatch enclosing allegations of brutality by the colonial forces as confidential, and showed it to his ministers.[3] The climax came in June 1867 when Buckingham finally decided not to renew his tenure of office.

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1. Gladstone Papers, Cardwell to Gladstone 20 Aug.1865. 27 August 1865 and 21 October 1865.
2. C.O.209/197 Grey to Carnarvon 15 Oct.1856. Minute by Carnarvon.
3. Ibid. Grey to Cardwell Separate 13 June 1866.

In one sense the abrupt ending of Grey's career was the outcome of his own personality, and his failure to conform to the duties of a Governor in relation to the Secretary of State. In 1866 he was rebuked so severely that Rogers, at least, hoped that he would resign.[1] But this was not the result of his giving information to his ministers contrary to Colonial Office directions. His fault was the tone in which he censured the Secretary of State for forwarding the complaint and for giving the direction. In the same way he replied to the deprivation of military authority by rebuking the Office for paying attention to documents provided by the War Department. Yet this was one of the many occasions when he had failed to supply the Imperial Government with information . The Office could hardly be expected to prolong the administration of a Governor who adopted this attitude in dispatches which he knew would be published. But in a larger sense, Grey was the victim of a conflict between Imperial and Colonial interest. The fundamental reason why he could not continue in office was his determination to champion what he considered to be New Zealand's interest.

It is true that the members of the Office subordinated every other consideration to securing the return of the

1. C.O.209/300 Grey to Carnarvon No.11, 12 Jan.1867.
   Minute by Rogers 25 March 1867.

troops. But it must be remembered that the colony had initiated the policy of "self-reliance", and until the critical year of 1869 the ministers showed no desire to reverse it. They steadily refused to pay a capitation allowance for the troops,[1] and the numbers of the colonial as well as the Imperial forces were gradually reduced.

Although the last regiment did not leave New Zealand until February 1870, from the beginning of 1865 the Colonial Office assumed the promised attitude of non-interference in native affairs. This year marks the handing over of responsibility for the Maoris much more clearly than 1861. Reviewing the acts of 1865, for example, Rogers considered that two of them "not only facilitate oppression but invite plunder".[2] The suppression of crimes in the Maori Districts Act would tempt Europeans to force a quarrel with natives in any districts where they wished to buy land, and confiscation would be used not to deal justice but to open up the country. The New Zealand Settlement Act left all "the tribes who engaged in rebellion, and probably many who had not,

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1. In 1865 the Colonial Government handed over debentures worth £500,000 to the Treasury. In 1867 it was agreed that this should be considered to satisfy the Imperial claim against New Zealand for military expenditure since 1862
2. C.O.209/196 Grey to Cardwell No.8, 9 Jan.1866. Minute by Rogers 10 April 1866.

absolutely dependent upon the mercy of the ministry". Yet he felt that the Imperial Government could not do more than record its objections. It could not require amendment. This situation stands out in contrast with that of a year earlier, when the colonists had felt bound to meet Cardwell's wishes for the alteration of the confiscation act of 1863 to a considerable degree.[1] It is true that the Indemnity Act of 1866 was disallowed on the advice of the Crown Law Officers.[2] But it was at the same time implied that the right of the Imperial government to take such action would be extinguished when the withdrawal was complete. Otherwise, the only positive proposal about Maori welfare was made in April 1866. It was suggested to Grey that the time might have arrived when the destruction of buildings and cultivations might come to an end in the interests of future tranquillity and prosperity.[3] A number of comments upon Maori affairs were made in dispatches in 1868, but for the most part they were purely formal and non-committal replies to the information furnished by the garrulous Bowen. The duty

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1. C.O.209/181 Grey to Cardwell No.106, 14 Aug.1865. Minute by Rogers 22 Oct.1865.
2. C.O.209/200 Grey to Carnarvon No.10, 12 Jan.1867. Minutes by Rogers (undated), Buckingham 8 April 1867.
3. C.O.209/196 Grey to Cardwell No.24, 13 Feb.1866. Draft Cardwell to Grey No.49, 24 April 1866.

of the Imperial Government to the Maori people had become the same as to the Australian aborigines - no more than the duty of drawing attention to reported acts of injustice.[1]

The Imperial policy of withdrawing the garrisons, combined with the development of self government in other spheres in New Zealand, made it necessary for the Colonial Office to disclaim responsibility for Maori welfare. It is a question whether any action of the Office between 1854 and 1863 could have prevented the Maoris from coming to that condition of misery which they endured after the wars. It is easy to point out how hostilities in Taranaki in 1860 and the Waikato in 1863 could have been avoided. But the fundamental problem was that of land, and it is more difficult to show that the Maoris could have been reconciled to European encroachment without conflict. It would doubtless have helped if there had been an Imperial contribution for the welfare and government of the natives,

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1. See for example C.O.209/210 Bowen to Buckingham No.20, 12 Feb.1869. Minutes by Rogers (undated), by Monsell 5 Apl. 1869. Draft Granville to Bowen No.43, 20 Apl.1869. C.O. 209/211 Bowen to Granville No.74, 25 June 1869. Draft Granville to Bowen No.98, 20 Sept.1869.

supplementing a more ample reservation in the Constitution Act, and also an Imperial force capable of overawing such restless chiefs as Rewi Maniapoto. But these were impossible in the existing state of feeling in Great Britain. Moreover, they would not necessarily have supplied the personalities who were needed to make government attractive to the tribes and to secure the co-operation of men like Wiremu Tamihana. The completeness of the failure of the measures of the Stafford Ministry before 1860 and of Grey afterwards makes it doubtful whether even an enlightened and comprehensive policy, backed by ample resources, could have succeeded, after 1854.

As Merivale had foreseen, a dual system of government proved impossible. Yet it cannot be said that the Office acted wrongly in making the experiment, since the situation was grave; the Governor's opinion unequivocal and none of the members had any intimate knowledge of New Zealand. The transfer of authority in 1861-62 was made at a most unfortunate moment from the standpoint of relations both with the Maoris and between the mother country and the settlers. But at this time every effort by the colonial office to put native administration on a sounder basis, by Imperial legislation and by prerogative, had failed. It was very natural then

to accept the opinion of the 'man on the spot'. In 1865 it was, as Rogers said, "not without diminution of credit" for the Office to abandon interest in the fate of the Maoris as part of a bargain. Apart from the dictates of Imperial policy, however, colonial self-reliance was an essential step in the evolution of responsible government. The policy was at least free from the ambiguity surrounding the attitude of the Home Government in earlier years.

Rogers was the outstanding figure in the Colonial Office. His ideas upon governing the Maoris had faults. But he realised the need to foster the influence of the chiefs as well as to impose order, he was aware of the vital importance of secure tenure of land and he contemplated a dynamic rather than a state society. Although they were tangled in the question of defence, the benevolence of his intentions towards the Maoris was undeniable. They were best shown by his part in persuading Newcastle to grant Imperial funds for their benefit, and in persuading Cardwell to modify the confiscation policy as originally embodied in the Act of 1863. But he was unduly suspicious of the settlers, and for once practically unable to appreciate their point of view. Newcastle and Fortescue, who owed many of their ideas to him, were better able to reconcile their

sympathies. Fortescue, in particular, by defending the colonists in England, did something to smooth their consistently uneasy relations,[1] as well as sharing fully in the somewhat negative functions of the Office regarding the Maoris.

1. Harrop, op.cit., pp.235-6.

Chapter VI.

Commercial Policy.

The new Imperial commercial policy gave the colonists freedom to trade with any country in the world in vessels of any nationality.[1] It also ensured that in future the colonial legislature alone would enact local tariffs.[2] The Home Government retained its right to disallow fiscal laws, but it would no longer impose customs duties to be levied in the colonies. Nevertheless, it was clear that Great Britain intended that free trade should be the policy of the whole Empire as much as the old "mercantile system" had been. Lord Grey, for example, by the Government Act of 1850, discouraged the preferences habitually given by the Australian colonies.[3] In 1847 he secured the repeal of a Canadian differential act, and in the following year he ordered the Lieutenant-Governor of New Brunswick not to

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1. See below Chapter I.

2. This was secured to the North American and West Indian colonies and Mauritius by 9 & 10 Vic.cap.94, which enabled them to repeal the Imperial duties imposed by the Possessions Acts of 1842 and 1845. No Imperial duties had been imposed on the Australian colonies.

3. 13 & 14 Vic. c.59 clause 27. See also C.D.Allin, The Tariff Relations of the Australian Colonies, pp.8-27.

assent to differential duties in future.[1] In the same way, Grey showed that he would not tolerate any protection of native industry, by refusing to allow a bounty upon hemp in New Brunswick in 1849.[2]

There were, of course, strong material reasons for this attitude. Confident as they might be in their own supremacy, British manufacturers were by no means inclined to allow their interests to be prejudiced in colonial markets, either by preference granted to others or by protective tariff barriers. The Government gave even greater weight to the possibility of colonial differential duties conflicting with Imperial treaty engagements. But quite apart from these considerations, the Imperial authorities sincerely believed free trade to be the only sound commercial policy. To insist upon it, despite the "islands of protection" remaining in the British system, was thought to be saving the colonists from the consequences of their own folly. This belief underlay the doctrinaire pronouncements of the Board of Trade,[3]

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1. Morrell, op.cit., pp.219-20. In addition, the Governors were required by the Royal Instructions to reserve bills imposing differential duties.

2. Hansard, Vol. CLVIII, col. 1252.

3. See for examples, C.O.201/544. Hallet to Under-Secretary forthe Colonies, 25 March 1857.

and was shared by the members of the Colonial Office. Newcastle, Herbert and Cardwell, for instance, were Peelites, while in 1840 Merivale had shown the burden imposed on British commerce by the old system, and had stressed the pre-eminent importance of the interests of the consumer.[1] The new colonial freedom was, therefore, held to mean freedom to dispense with artifical restrictions upon trade, not liberty to depart from the principles of the mother country.

Colonial belief in free trade, however, tended to be less whole-hearted than did English. There was general acquiescence for the moment, but any steps towards developing manufactures would bring a desire to foster them by a protective tariff. The improvement of communications, practical convenience, or political circumstances might at any time revive colonial wishes to extend preferences to other members of the same group. Both policies would contravene the British principle that duties should be levied for revenue only, and should be imposed without reference to place of origin. In the light of these possibilities it remained to be seen after 1854 whether the question of Imperial power over the colonial fiscal systems was really closed, or whether the temper of the responsibly-governed colonies would force concessions in this respect.

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3. Merivale, op.cit., Lectures VII & VIII pp.187 ff.

The conclusion of the Reciprocity Treaty of 1854 appeared to recognise that the interests of a self-governing colony must be safeguarded even when they ran counter to Imperial policy. The Treaty in effect sanctioned differential duties, since Canada abolished duties upon produce imported from the United States, but not upon similar produce from elsewhere. The Government however, had only waived its principles because Elgin had insisted that free interchange of produce between the United States and the British North American provinces was essential to secure Canadian loyalty.[1] No man of less prestige could have gained the concession, and it was not a precedent likely to be followed. The Board of Trade made no bones about regretting "that some other means were not found" for solving the problem of Canadian prosperity, and that a breach had been made in "general policy in matters of commerce."[2] As early as 1856 the

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1. Morrell, op.cit., pp. 228-230.

2. C.O. 323/247 Hammond to Merivale 11 April 1856. Encl. Booth to Hammond, 5 April 1856.

Board, the Colonial Office and the Foreign Office united in an effort to modify the special character of the arrangement. Strictly speaking, it stood in the way of the practice of making commercial treaties containing a "most-favoured nation" clause - the practice through which Great Britain hoped, not only to extend her own commerce, but also to lead other nations into the path of free trade. When the treaty with Naples was being negotiated in 1856, Merivale thought the clause would have to be abandoned in future as inconsistent with the Reciprocity Treaty.[1] The Board and the Foreign Office refused to make such a sacrifice. They would not even insert a clause in the Neapolitan treaty excluding North American so far as the articles enumerated in the Reciprocity Treaty were concerned, since this would emphasis the fact that Great Britain herself was a party, to a preferential agreement.[2] In practice, the Board pointed out, that neither Naples nor the twenty other countries bound to Great Britain by similar commercial treaties had, nor could have, any trade with the North American provinces in the enumerated articles since they could not compete

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1. C.O.323/247 Hammond to Merivale 9 February 1856. Minute by Merivale 13 February 1856, and note on draft. Merivale to Hammond 8 March 1856.

2. C.O.323/247 Hammond to Merivale 11 April 1856. Enclosure to Hammond 5 April 1856.

there with the United States. Consequently, it proposed that the provinces should alter their tariffs to allow all the goods which were admitted duty free from the United States, to be admitted duty free from all countries, or, at least, from countries having commercial treaties with Great Britain.

In advocating this step, The Board had only considered whether colonial revenue would be affected. The Colonial Office, however, did not ignore the rights of the legislatures to regulate their own tariffs.[1] The most that Labouchere could promise was to recommend the course to the Governors, and he did not adopt the Foreign Office's arbitrary suggestion that they should be "called upon" to comply.[2] But the members of the Office agreed heartily enough with their colleagues not to send merely a vague invitation to the Governors. Ball, in particular, spent a great deal of labour in endeavouring to persuade them that the loss of revenue would be negligible when the differential duties were removed.[3] Very little stress

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1. C.O.323/247 Hammond to Merivale 11 April 1856. Minutes by Ball (undated) and Labouchere, 16 April 1856. Draft Merivale to Hammond 7 May 1856.

2. C.O.323/247 Hammond to Merivale 16 May 1856.

3. C.O.43/151 Labouchere to Head 15 July 1856. It was agreed that under the conditions prior to 1854 the loss would only have been about £2. in every £1000. Since the Treaty, the United States would have engrossed far more, if not all, the trade in the enumerated articles and it would be very much less. The Colonial Office figures were incomplete and out of date.

was laid on the desirability of abolishing all import duties on the articles admitted duty-free from the United States. It was rather implied that the main need was to give others powers having commercial treaties with Great Britain the same privileges. Indeed, the letters from the Board and the Foreign Office had conveyed a similar impression even more strongly, either from oversight, design or the conviction that the matter had little practical importance.

The effort to cancel the preferential aspect of the Rec#iprocity Treaty was almost without result. Prince Edward Island alone fully met the wishes of the Imperial Government, and then only after her very natural proposal to extend, rather than abolish, reciprocity had been rejected.[1] Newfoundland professed the warmest agreement "on the expediency of abolishing distinctions", but showed that her revenue would, in fact, be gravely affected and that she could not afford to make any alteration.[2] In her turn, Canada replied that in the case of most of the enumerated articles the breach of free trade principles was nominal. But she, also, refused to sacrifice her income from dried fruit, the one case where it operated

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1. C.O.323/247 Hammond to Merivale 11 April 1856. Minutes by Ball (undated), and Labouchere 16 April 1856. Draft Merivale to Hammond 7 May 1856.

2. C.O.323/247 Hammond to Merivale 16 May 1856.

in practice.[1] Neither Nova Scotia nor New Brunswick took any action. The Imperial Government might not have acquiesced so readily in these answers if colonial trade with any of the treaty countries had been affected, or if there had been any real danger of retaliation upon the commerce of the United Kingdom. It was very clear, however, that the colonists could not be commanded to abandon already existing preferences on the ground of conflict with Imperial interests.

But this was to be the limit of Imperial forebearance. It was determined not to allow any further discrimination in colonial tariffs. In June 1855 Russell unhesitatingly accepted the Board of Trade's advice to veto a proposal for reciprocal free trade made by the chairman of a committee of the Canadian Assembly to the British West Indian colonies.[2] When he came into office in July, Molesworth agreed that the colonies must conform to the policy of the mother country.[3] To him the gravest objection to the scheme was that reciprocal preferences

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1. C.O.42/605. Head to Labouchere 3 Nov.1856. Encl.Minute of Executive Council 21 October, 1856.

2. C.O.111/304 Woodhouse to Russell No.48, April 1855. C.O. 111/307 Cook to Merivale 25 June 1855. Minutes by Taylor, Merivale,(June 30) Ball (July 11) and Russell (12 July). C.O.42/598 Head to Russell 20 July 1855. P.P.H.C.1854, XLIV (433) pp.3 ff.

3. C.O.111/307 Booth to Merivale 25 June 1855. Minutes by Molesworth 7 Aug.1856 and Ball (undated). Draft Molesworth to W.Indian Gov. 11 Aug.1856.

between two colonies would tend to cut them off commercially from the others. It opened a prospect of an Empire divided into commercial sections, instead of an Empire bound together by material interests. Free-trader though he was, his conception was in reality more suited to an Imperial zollverein. His predecessor and the other members of the Office followed the Board of Trade in stressing the discrimination against the United Kingdom and the breach of free trade itself; the suggested preference against foreign countries was not less reprehensible than that against the other colonies.

As a result of this difference in emphasis, Molesworth sent a circular despatch to the West Indian governors, pointing out his additional reason for supporting the comprehensive instruction which Russell Himself had written a month earlier to all the Governors. in the Empire:-

> "to withold assent to legislation containing provisions either in the nature of a prohibition of the articles from elsewhere ..... or imposing differential duties, whether on articles of British, colonial or foreign produce as against similar articles produced in your colony itself or in favour of one colony or another." 1

Canada escaped any direct censure, since the approach to the West Indies had been entirely unofficial. But any doubt whether the ban on preferences applied to responsibly-governed colonies was removed when the Colonial Office

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1. C.O.42/600. Maclean to Merivale 17 May 1855. Minute by Russell 28 May 1855.

refused to allow New Brunswick to give special privileges to the United States in trade with her port of St.Stephens.[1] The only concession was purely nominal. In deference to her status, Merivale persuaded Labouchere and Ball to alter their original intention of disallowing the Act by order in council, and to take the less offensive step of withholding the sanction necessary before an act containing a suspending clause came into operation.

Even before he had heard of the proposal for reciprocity between Canada and the West Indies, Russell had decided to lay down general rules for colonial tariffs, since Canada appeared to be protecting her sugar refiners in the customs duties of 1855.[2] Discussion of discrimination in favour of local products can be dissociated to a certain extent from discrimination in favour of imports from one place as against others, although in essence they are but two aspects of the same question. From the Colonial Office standpoint the distinction, in the first place, lay in the fact that protection to native industry affected other countries and colonies only indirectly. If

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1. C.O.188/127 Manners-Sutton to Labouchere No.11,31 July,1856. Draft Labouchere to Manners-Sutton, 22 Nov.1856.C.O.188/128 Booth to Elliot, 17 Oct.1856.Minutes by Merivale 25 Oct., Ball 28.Oct.,Labouchere 2 Nov.1856.

2. See for example C.O.42/600 McLean to Merivale 17 May 1855. Minutes by Russell 23 May1855. Memorandum by Blackwood.

the Home Government intervened in this case it appeared much more clearly as a violation of the principle that local affairs were the province of the local legislature. In the second place, the two aspects were distinguished in that it was almost impossible to prove the existence of protection. Whatever the motive in levying a high import duty, it could always be argued that it was necessary for revenue purposes. The Board of Trade lamented that when the old restrictions had been relaxed the Government had erred "on the side of an undue regard for the principles of self-government" in not requiring colonies in levying import duties to place excise duties on the corresponding native products.[1] In their absence, the problem of motive remained unsolved.

The difficulty was particularly acute with regard to Canada in the second half of the eighteen-fifties.[2] Her need for revenue was undeniable. Her programme of public works, in particular the dvelopment of railways and canals, involved a public debt of over £7,000,000 by 1858. Interest had to be met from a revenue which had suffered severely from the depression of 1857-8. This in itself might be held to account for the tariffs of the decade.

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1. C.O.201/544. Mallet to Colonial Office, 23 March 1867.

2. See for example MacDiarmid, Commercial Policy in the Canadian Economy, pp. 69-92. Innes, An Economic History of Canada, p.160.

Their general character is indicated by the rise of the duty on the "general list" from 12½% in 1849 to 15% in 1855 and to 20% in 1859. At the same time, as the Colonial Office was well aware, there was a very strong agitation for a fiscal policy to protect such interests as the sugar refining industry, and the manufacturers of boots and shoes, farm implements and textiles which were just starting to become important. Recent writers have agreed that the Finance Ministers, Cayley and Galt, described their tariffs truthfully as revenue measures involving incidental protection.[1] In the circumstances, however, it was difficult for contemporaries to judge which was the primary motive.

The Liverpool sugar refiners had no doubt, and early in 1855 complained that substantial protection was given to Canadian refiners, since the duty on raw sugar remained at 6/6 a cwt. while that on refined sugar was increased from 10/- to 12/- a cwt.[2] Their protests gained considerable weight from the support of the Treasury and the Board of Trade, which declared that the duties

> "could not be sanctioned by Her Majesty's Government not only because it would be unjust to similar producers in this country, but because it puts a high tax upon the Canadian consumer."

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1. MacDiarmid, op.cit., p.79. C.H.R., Vol.XV, D.C.Masters, A.T. Galt and Fiscal Autonomy, pp.276-77.

2. C.O.42/600 Memorial of Liverpool Sugar Refiners to Grey, 23 Jan.1855. C.O.42/601 Wilson to Merivale, 9 Jan.1855 and 16 May 1855. Ibid. Memorandum of Stanley of Alderley, 22 May.1855.

At first the Colonial Office, taking the same attitude as towards differential duties, also assumed that Canada must be forced to amend her tariff or even have it disallowed. But Merivale implicitly adopted the distinction which we have noticed, and brought the real issue into the open by pointing out:

> "it is a question of the most serious importance whether the Goverment will, or will not, interfere with the legislation of quasi-independant colonies when they impose duties protective to their own industry," 1

As so often, he refrained from giving direct advice, yet he seemed to incline to non-interference when he showed that the only precedent for veto was the "comparatively unimportant" New Brunswick bounty of 1849. Russell, notwithstanding the terms of his circular, followed Ball in thinking that he could no longer intervene to safeguard the Canadian consumer against the action of his own legislature.[2] He sent the Treasury ruling that duties on refined sugar should not exceed those on raw sugar by more than 33⅓% to the Governor, and asked for an explanation only upon the ground that British producers were injured by the breach of Free Trade principles.

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1. C.O.42/601. Wilson to Merivale 9 January 1355. Minute by Grey 15 January 1855. Ibid. Wilson to Merivale 16 May 1855. Minutes by Blackwood 17 May 1855, by Merivale 19 May 1855.

2. Ibid. Minute by Russell. Draft Russell to Head No.20, 25 May 1855; and C.O.42/600 MacClean to Merivale 17 May 1855. Minute by Russell 28 May 1855.

The Canadian finance ministers replied, quite correctly, that the Imperial tariff of 1854 did not conform to the Treasury's principle.[1] Moreover, in comparisdn with earlier tariffs the margin between the duties on raw and refined sugar had lessened. The Treasury, when consulted by the Colonial Office,either could not or would not find an answer to these arguments,[2] and the duties remained in operation. The series of events was repeated in the following year, when Canadd raised the duty upon raw sugar by one shilling but upon refined sugar by two. Liverpool again protested, and the Canadian finance minister took his stand upon a comparison with the rates of 1854, which had been sanctioned.[3] Had that proportion been maintained the duty upon refined sugar should be 13/10 instead of 14/-, but he asserted that the latter figure was adopted solely for the convenience of working in round numbers. The Board of Trade regarded this extra 2d as a protection "small but

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1. C.O.42/598 Head to Secretary of State No.71, 9 June 1855. See also 17 & 18 Vic. cap.28.

2. Treasury Papers T1/5938B. There is no comment or direction upon the Colonial Office letter and the correspondence with the refiners was closed.

3. C.O.42/608 MacPhie to Secretary of State 7 May 1856. C.O. 42/606 B.of T. to Colonial Office 21 May 1856. C.O.42/604 Head-toLabouchere 12 July 1856. Encl.Report of Inspector General 11 Jy. 1856 and Report of Commissioner of Customs.

objectionable in principle".[1] When the time came for a decision on the Customs Acts, however, the Board agreed to accept the Canadian argument at its face value and since the Colonial Office concurred the Act was allowed.[2]

The decision was something of a triumph for Canada's control over her tariff, but it was by no means conclusive. She denied any protective intention, and the duties were sanctioned on this understanding. The right of the Imperial Government to require her to conform to Free Trade standards had not been called into question and was certainly not repudiated. The real significance of the affair was, that after Merivale brought its implications into the light and Ball and Russell decided they owed no duty to the Canadian consumer, the members of the Colonial Office began to move away from Lord Grey's conception of the proper course towards protection. To some degree this was the result of the colonial practice of sending home laws at the end of the year instead of immediately upon enactment. It was obvious that the legislature would be reluctant to amend an act which had worked satisfactorily for several months and the time lapse increased if indeed that were possible, - the anxiety of the Colonial Office to avoid disallowances.

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1. C.O.42/606 Booth to Merivale 20 August 1856.
2. C.O.42/611. Booth to Merivale 14 Jan.1857. Draft Labouchere to Head No.74, 30 Jan.1857.

While it was of general application, the delay, as the legal adviser pointed out, made Imperial interference particularly difficult in the case of customs acts.[1] Further, and apart from the question of any drastic action, the Office was coming to accept the fact that there was "very little hope", as Blackwood put it, of persuading Canada to amend her customs laws.

The development of this opinion was as consistent as the steady rise in the rates of the Canadian duty. Rumours of the Cayley Tariff of 1858 with its increase on manufactured goods, rising to 25% ad valorem on leather manufactures, led the Sheffield Chamber of Commerce to press the need for discouraging the protective tendency. Stanley, newly in office, urged Head to try to prevent the imposition of such heavy duties, but only in the face of Merivale's discouragement.[2] The Governor himself was, of course, far too wise to rouse suspicion of British interference by doing more than allowing his personal views on commercial principles to be known. At the moment, he thought revenue the chief motive, but he expected that sooner or later the government must be influenced by the protectionist sentiment of the community. Even in the

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1. C.O.323/78 Wood to Merivale 10 Apl. 1855 and C.O.323/82 Wood to Merivale 18 December 1856.
2. C.O.42/614 Head to Lytton, Confidential 11 June 1858. Draft Stanley to Head Confidential 25 May 1858. Note by Merivale. Copy Jackson to Roebuck 15 May 1858.

face of this prophecy, no one in the Office contradicted his blunt statement that "self government which operates only when its views agree with others is a contradiction in terms." Blackwood, indeed, was even less equivoca:-

> "It was clear from the first than in a province with complete Parliamentary government it was out of the question for the Home Government to interfere successfully in a matter which related to the imposition of duties." 1.

Again, when the Galt tariff of 1859 reached a new high level, Merivale remarked "the only reason thought sufficient for interference with the customs act of a colony like Canada would be the introduction of differential provisions." 2 In July 1859 Newcastle informed a deputation from the Sheffield Chamber of Commerce that he could not disallow the tariff - conclusive proof that he shared the views of the other members of the Office.[3]

Yet Newcastle himself was responsible for the provocative wording of his despatch of August 13 which called forth Galt's assertions of the right of the people of Canada to decide how they themselves should be taxed.

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1. C.O.42/614 Head to Stanley, Confidential 25 May 1858. Minute by Blackwood 28 June 1858.
2. C.O.42/617 Head to Newcastle No.40, 26 March 1859. Minute by Merivale 14 April 1859.
3. C.O.42/621 Sheffield Chamber of Commerce to Newcastle 1 Aug.1859. Memorandum by Newcastle 2 Aug.1859.

Even the Board of Trade would not advise disallowance, although it supported the Sheffield complaint that the tariff would almost prohibit the import of steel manufactures from England, and would encourage them from the United States.[1] The Secretary of State, in amending the draft, substituted the phrase "I may probably feel that I can take no other course than to signify to you the Queen's assent", which implied some doubt, instead of a phrase which virtually excluded the idea of veto.[2] Besides writing in the interests of the Sheffield manufactures and general free trade principles, Newcastle again assumed the right to protest on behalf of the welfare of the colonies - the stand abandoned four years earlier. It is not altogether easy to explain his tactlessness. It may be conjectured that, having returned to office after an interval of five years; in his enthusiasm for free trade he had forgotten that a responsibly governed colony would resent no blunt an admonition. At this particular time he was much disturbed over the protectionist trend in Canada and especially over its effect upon British exporters.[3] The very fact that he felt himself helpless in respect to the tariff probably caused the incautious asperity in the tone of the despatch.

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1. Ibid. Encl. Both to Blackwood 6 Aug.1859.
2. C.O.42/621 Sheffield Chamber of Commerce to Newcastle 1 Aug. 1859. See draft Newcastle to Head 13 Aug.1859.
3. See below page.247.

He succeeded, as it is well-known, in raising a whirl-wind in the shape of Galt's claims for fiscal autonomy:

> "Self government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada.... It is the duty of that present government distinctly to affirm the right of the Canadian legislature to adjust the taxationsof the people in the way they deem best, even if it should unfortunately merit the disapproval of the Imperial Government. Her Majesty's Government cannot be advised to disallow such acts unless her advisers are prepared to assume the administration of Canada irrespective of the views of its inhabitants." 1.

This was a statement of nothing less than absolute fiscal independance. But he denied that Canada had exercised the right to be independant of British policy on this occasion. He furnished a detailed defence of his measure, founded solely on the need for revenue. He was able to prove that the Sheffield complaint was unfounded in this instance, since the duty on steel manufactures remained at 20% ad valorem imposed in 1858. Moreover, as the duty on raw material had been raised from 5 to 10% Sheffield's position in relation to the Canadian manufactures had, indeed, been improved. He contended that the charge of discrimination in favour of the United States against the United Kingdom was also groundless, because the

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1. C.O.42/619 Head to Newcastle No.118,Nov.11 1859.Enclosure Min. of Ex.C. Sub-encl. Report of the Minister of Finance to the Exec. Council. Printed in P.P. H.C. 1864.Vol.XLI (460).

ad valorem rate was based upon the price in the country of origin. The price was bound to be higher in the United States, where raw material had to pay an import duty of 24%, than in Great Britain. Further, if Sheffield was able to maintain her market in America despite a tariff barrier of 24%, should she not much more be able to do so in Canda where only 20% was levied? On the general issue Galt declared that the wide range of goods admitted free, made the average level of taxation entirely reasonable. He put his case for revenue with exceptional cogency. He emphasised the essential need to keep faith with English investor in the Canadian public debt whose interest must be derived from indirect taxation.

It would be wrong to assumethat the members of the Colonial Office entirely acquiesced in the Canadian Finance Minister's sweeping pretensions. They evaded discussion of it, since the immediate issue was pre-judged in any event; but they showed no resentment. Two considerations dominated their minds. The first was unqualified admiration for the ability of Galt's report.[1] The Board of Trade confirmed its soundness, although it criticised details, and was not prepared to admit that the rate of duty spread over the whole range of imports was as low as he maintained.[2]. How could it agree that incidental protection was a subject for congratulation, and prophesied that high duties must ultimately prove detrimental to

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1. See for example C.O.42/619 Head to Newcastle No.118, 11 Nov. 1859. Minute by Newcastle 7 Dec.1859.
2. C.O.42/624 Booth to Under-Secretary of State. C.O. 17 Jan.1860.

Canadian trade, although as yet it had not suffered. Secondly, the Colonial Office realised that it had been in the wrong, not only on a question of fact, but in compelling a colony of Canada's importance to justify its whole fiscal policy "on an ex parte representation from a provincial town in England." [1]

Elliot was foremost in urging this aspect, and, if his attitude owed something to the personal influence of Galt, it was equally consistent with his occasional imaginative sympathy with the colonial point of view. He was very critical of the tone of the Board's letters "written somewhat in the good old style of thirty years ago .... the language of superiors judging the conduct of subordinates". [2] He thought it inappropriate because he doubted whether any official had really studied the Canadian budget; and, in any case, nothing but residence in Canada would make him competent to judge it properly. The members of the Office very humanly blamed the Board of Trade rather than the Secretary of State for the whole incident, but at the time none of them were far behind Elliot in acknowledging themselves to have been tactless.

Dr.Masters cleared up a common misunderstanding about the controversy, so often accepted as a landmark in the

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1. C.O.42/624 Sheffield Chamber of Commerce to Newcastle 12 May 1860. Minutes by Elliot 16 May and Fortescue 17 May 1860.

2. Ibid. Galt visited England in December 1859.

development of self-government, when he pointed out that Galt's claims were premature, a reflection of what he wished Canada's position to be rather than what it was.[1] On the one hand, full fiscal autonomy must include the right to impose differential duties; on the other, Galt did not establish the right to adopt protection since he justified his tariff on the ground of revenue. But Dr. Masters, while admitting that the controversy was significant, has not fully analysed its importance, since his subject was limited. Yet, in many ways, the commonly accepted estimate of the events of 1859 is justified.

From the Colonial Office standpoint, indeed, it is clear that the sanction of the tariff was simply a continuation of an established policy, and not a revolutionary step forced upon it by Galt. Moreover had it been intentionally, instead of incidentally, protective, assent would equally have been given. Galt's report, had, nevertheless, an effect upon the members in increasing their tendency to look upon Canadian fiscal policy from a political, rather than an economic, point of view. And in future a great deal more caution was shown in forwarding complaints from English interests. They were still sent for consideration, but were not given official endorsement.[2] In a more general sense, it must be

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1. C.H.R.,VolXV, Masters, op. cit., pp276-7.
2. C.O.42/639 Sheffield Chamber of Commerce to Newcastle 10 Sept. 1863. C.O.42/661 Samuelson to Cardwell 1 June 1866.

remembered that contemporaries accepted the issue as protection. For the Manchester school the tariff meant a further argument in favour of separation, and for the majority of British politicians it furnished a strong reason against defending Canada at Imperial expense.[1] For the self governing colonies, the incident meant that their rights had been publicly defined by Galt and had not been contradicted. Accordingly, Victoria was able to adopt a protective policy, tentatively in 1861 and after, a clear official announcement in 1864, without fear of Imperial prohibition.[2]

In resuming the discussion of differential duties, it must be emphasised that they were not touched in principle by the events of 1859. They were, however, influenced in practice. In the summer of 1859, Newcastle vetoed a Canadian act involving differential provisions, because he knew he could not take action against the tariff.[3] The act, designed to retaliate against the United States, imposed duties on foreign shipping admitted to the Canadian coasting trade unless it belonged to countries which admitted British shipping free. In strictness it came under the ban against discrimination, but it was not so clearly a

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1. See for example P.P. H.C. 1861, XIII (423) Question 3790. Bodelsen, op.cit., p.38.
2. See page 113 above.
3. C.O.42/620 Booth to Merivale 15 August 1859. Minute by Newcastle 17 August 1859.

breach of free trade as were differential customs duties and a New Zealand law of 1856 embodying a very similar proviso had been left to its operation. Merivale concluded that it would be mere pedantry to forbid the Canadian act on the ground of a possible violation of commercial treaties with South American states - some of them inland - which "never 'produced' a ship since Canning called them into existence".[1] This left repugnance to Imperial principle as the only reason for disallowance. Merivale appeared at first reluctant to use it, Fortescue eager, and Newcastle finally consented because, like the Parliamentary Under-Secretary, he knew himself helpless in regard to the tariff and thought the opportunity must be taken to check Canada's independent line in commercial affairs.[2]

The Canadian finance minister did not protest at the disallowance, although he had sponsored the act. At the end of the year, however, he did challenge the policy of non-discrimination, by a proposal for reciprocal free trade between the North American colonies, which, it was hoped, would ultimately lead to an entire assimilation of their tariffs. There was considerable reason to hope for Imperial consent, since this would be little more than an

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1. C.O.42/620 Booth to Merivale 5 August 1859. Minute by Merivale 12 August 1859.
2. C.O.42/620 Booth to Merivale 6 July 1859. Minute by Merivale 5 August 1859. Minutes by Fortescue 14 August 1859, and Newcastle 17 August 1859. C.O.42/618 Head to Newcastle No.65,13 May 1859. Draft Newcastle to Head No. 28, 27 August 1859.
3. C.O.42/619 Head to Newcastle No.122,24 Nov.1859. See also C.O.188/132 Manners-Sutton to Newcastle No.25, 3 May 1859 and No.58,3 December 1859.

extension of free exchange in certain raw materials and foodstuffs which survived from the arrangements of 1850 despite intermittent opposition from the Board of Trade. Further, the Reciprocity Treaty with the United States showed that the rule against differential duties might be relaxed in the face of strong political consideration. Russell's and Molesworth's decision of 1855 might have been expected to preclude the revival of suggestions for inter-colonial preferences, but Galt's belief that commercial union would be a first step towards political union naturally led him to ignore a ruling which had not been specifically applied to the North American colonies.

The Colonial Office was not at first alive to the political implications, and merely sent the proposal to the Board of Trade and forwarded its report to Canada. The Board's vigorous opposition was governed more by its dislike of Canadian commercial policy than by its unwillingness to allow any breach of Free Trade principles.[1] It feared that, if reciprocity were followed by an assimilation of customs duties, the character of the tariff of Canada, the strongest colony, would be extended to the Maritimes. Consequently, it declared that it could only assent on a condition which it knew the colonies could not entertain because of their revenue problems, - that discrimination should be avoided by abolishing customs duties on all

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1. C.O.42/624 Booth to Under Secretary of State, C.O. 14 March 1860.

products and manufactures exchanged free between them. It stressed that otherwise a procedent would be established which would make it impossible to refuse other colonies the same privilege of deviating from Imperial policy.

This argument was unanswerable, so Galt in reply boldly condemned the Board's definition of Free Trade as far too narrow.[1] The rules laid down - the absence of discrimination as to place of origin and the balancing of import duties by the imposition of excise duties on corresponding home products - were no more than a statement of the way in which free trade was best adopted to suit the peculiar fiscal needs of Great Britain. He took a far wider and more general view of free trade as "the unrestricted interchange of labour, skill and capital of mankind." From this basis he argued that the removal of restrictions between colonies was a step forward, even if it involved differential duties against the outside world. If inter-colonial free trade were followed by an assimilation of tariffs between the North American colonies, and if the precedent were followed by other groups of colonies, there would be only five or six different customs systems within the Empire. This would ultimately make for harmony between the tariffs of the United Kingdom and the dependencies, even if an

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1. C.O.42/626 Head to Newcastle No.2, January 2 1861 Encl. Report of Executive Council 2 January 1861. Sub-enclosure Memorandum of Minister of Finance 20 August 1860.

Imperial commercial union should prove forever impossible. Coming to existing circumstances, Galt posed two questions. The first held something of the same challenge as his famous report. If each colony was free to decide upon its tariff policy, why should the Imperial Government exercise a greater restraint upon a group? The answer, was, obviously that the individual colonies were only free to impose a tariff not involving differential duties; but it was one which in the present state of feeling the Colonial Office might not feel inclined to give. Secondly, Galt asked why, since the political union of the colonies was, he believed, inevitable, should the benefit of commercial union be denied to them in the meantime?

At this point, it was clear that the members of the Colonial Office had to choose between the orthodox views of their colleagues and those of Galt, at least upon the practical point. In the light of the result of the recent controversy it was, perhaps, not surprising that they should choose the latters. It was, however, hardly to be expected that they should throw themselves so wholeheartedly into Canada's defence as Elliot did when he not only upheld colonial autonomy but vied with Galt, himself in demonstrating the absurdity of an extreme application of the Board's principles.

> "Free Trade in the special sense to which our disputes and struggles have restricted it ..... reduced the character of a customs duty to a question of <u>motives</u>

> ..... The truth is that every tax must be more or less an encouragement to the consumption of the most various articles which are free from taxation .... if the views of the Board of Trade were to be sincerely adopted, we should have to enter upon a wild goose chase of taxation upon every sort of article for fear it should otherwise be gaining some remote indirect benefit from the taxes already existing on other articles." 1

Having discredited the Board to the best of his ability, he urged his superiors to decide the question on the "broad and general views of a statesman". He argued that the Canadian proposal was leading to the abolition of the nuisance of internal customs houses between colonies "in a vast tract ... separated by only imaginary boundaries", and that the foreign nations could not complain that free exchange between them was any more a breach of treaties than free exchange between counties in England. It would be a "consummation of unwisdom" for the Imperial Government to appear as the upholder of trammels on inter-colonial trade if the colonists wished to be rid of them.

Elliot's vigour was only partly the result of his ability to look at the problem of the North American colonists with their own eyes. He saw the question had a vital importance in its bearing on the good relations between the mother country and the colonies and this was his chief

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1. C.O. 42/626 Head to Newcastle No.2, Jan. 2 1861. Minute by Elliot 9 March 1861.

concern. He thought Great Britain should preserve those good relations, even to the extent of supporting Federation if there should be a general desire for it, although he himself heartily disapproved. At the moment, he felt that the Board of Trade was standing in the way of harmony, and regretted that a virtually direct and mutually irritating correspondence had been allowed to take place between the Board and the Canadian Executive Council. Consequently, he was very anxious that the Colonial Office should make its own decision. In all probability the other members were already inclined to his point of view, but his arguments removed whatever doubt remained. Rogers, Fortescue and Newcastle alike agreed that the Colonial Office could not oppose a public benefit such as the removal of vexatious and expensive internal customs houses.[1] The Board of Trade threatened the Office with the discontent of British manufacturers when they found the Canadian tariff extended to the Maritimes, but it had no power to shake the decision.[2]

The episode showed the Colonial Office increasingly aware that political considerations must govern its actions towards the British North American colonies. Where six months earlier Newcastle and Fortescue seized the opportunity

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1, C.O. 42/626 Head to Newcastle No.2, Jan.2 1861. Minutes by Rogers 22 Jan. and March (undated) 1861, by Fortescue 12 March and Newcastle 13 March 1861.

2. C.O. 42/630 Booth to Under Secretary of State, C.O. 10 April 1861.

of vetoing the shipping act to restrain Canada's policy, they now refused to use the principle of differential duties to confine the operation of Canada's tariff to her own boundaries.' Galt's failture to induce the Maritimes to agree to complete reciprocity, still less to tariff assimilation, did not alter the fact that North American fiscal rights now included the right to give unrestricted preference to the sister colonies. It was, however, a limited concession, not very much greater than the specific concessions made by the Reciprocity Treaty, or in the existing inter-colonial arrangements. It applied only to trade between the North American colonies. It did not include the power to give preferences to any other colony or to any other country. Newfoundland was compelled to amend an act discriminating against fish brought in by vessels not belonging to the Island in 1867 and in 1866 the Colonial Office joined with the Foreign Office and Board of Trade in impressing upon the members of the North American Trade delegation that Imperial policy still forbade them to grant differential duties to any foreign nation.[1]

The concession, moreover, was a concession made to the British North American colonies, not to responsibly governed colonies as such. Yet political separation combined with geographical unity was equally a feature of Australian life. After Lord Grey had failed to establish a federal authority, or at least a customs union, the colonies pursued their own

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1.C.O.42/654 Monck to Cardwell No.13,Mar.2.1866.Minute by Cardwell 22 Mar.1866. Draft Cardwell to Monck, Confidental 24 Mar.1866.

tariff policies. With the partial exception of Tasmania they were all designed for revenue, and during the fifties were in themselves little hindrance to sea-borne inter-colonial trade.[1] The problem of collecting duties on inland frontiers presented itself for the first time in the middle of the decade, when, as a result of the gold discoveries, the River Murray became a highway for imports through Adelaide to the Riverina districts of New South Wales and the Victorian goldfields. It was met by the Murray River Conventions of 1855 and 1857, when South Australia collected all duties at Adelaide, and divided those upon goods bound for New South Wales and Victoria equally between them. At the same time, New South Wales made her tariff as nearly identical with Victoria's as possible, and goods passed freely across the River Murray between them. In 1854, New South Wales had tried to erect customs houses, but had caused great discontent among her Riverina citizens whose economic ties were all with Victoria and who had to pay double duties on their imports, once at Melbourne and once at Albury on entering New South Wales. Both agreements survived the fifties but uneasily enough to cause proposals for tariff assimilation and intercolonial free trade to be always alive.

By the beginning of 1867 when the matter came before the

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1. N.S.W. taxed a certain number of articles of general consumption; Victoria fewer but at higher rates; S.Australia levied fairly small ad valorem duties on almost every article of import, and Tasmania specific and ad valorem duties. Allin, Tariff Relations of the Australian Colonies,

Colonial Office, the situation had changed. The Murray River Convention had been denounced, and the fiscal relations of the colonies became a great deal more bitter. The main reason was Victoria's adoption of a protective policy. It intensified the problem of the Riverina, for the tobacco and wine growers found themselves deprived of their market in Victoria because of the high import duties. Consequently, in December 1866 the New South Wales Executive Council petitioned for the repeal of the clause in the Australian Colonies Government Act forbidding differential duties.[1] This would make it possible for some arrangement to be made for reciprocity between New South Wales and Victoria. Three months later a provisional agreement between the two colonies for the collection of duties on goods imported through South Australia and for free trade across the Murray was forwarded to the Colonial Office.[2] At the same time, Tasmania passed a reserved bill to allow free trade between the colonies, with the same hope of preserving her dwindling market in Victoria.[3]

The Colonial Office and the Board of Trade alike had welcomed every effort to reduce the difficulties and confusion resulting from the differing fiscal system. They had warmly supported the provisions for a uniform tariff

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1. C.O.201/539 Young to Cardwell, Confidential, 24 Nov.1866. Encl.Memorandum of Finance Minister 24 Nov.1866. Young to Cardwell No.87, 21.Dec.1866. P.P. H.C.1872,XL11 (576).
2. C.O.201/542 Young to Cardwell No.12, 24 Jan.1867.
3. C.O.280/372 Gore Brown to Cardwell No.34, 20 Feb.1867.

which had been drawn up by an intercolonial conference at Melbourne in 1863, but which none of the colonies had accepted. The Board, however, met the New South Wales and Tasmanian proposals with the same rigidity as it had shown towards Galt's.[1] Its case rested purely upon the breach of free trade principles and this time it had no underlying motives. Great Britain, now that she had attained much success in removing differential principles from continental tariffs could not allow her colonies to set an example of discrimination. In view of the existing differences in tariff and revenue needs, the concession could not be expected to lead to anything approaching a customs union between the Australian colonies. It could only result in a tariff bargain utterly opposed to British doctrine. The Board did, however, advise sanctioning the arrangement between Victoria and New South Wales regarding the River Murray. Here it admitted very special circumstances, since to an "exceptional degree" nature had intended the Riverina district and Victoria to be one - an "enormous concession of principle" as Rogers observed.[2]

Rogers accepted the Board of Trade's advice to refuse the New South Wales petition, to veto the Tasmanian Act, and to confirm the Riverina agreement.[3] But he was critical

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1. C.O.201/544 Mallet to Under Secretary of State, C.O. 25 Mar. 1867.
2. C.O.201/544 Farrar to Under Secretary of State, C.O. 5 May. 1867. Marginal note by Rogers.
3. Ibid. Minutes by Rogers 27 May and 28 December 1867.

of the Board's general attitude and arguments. He adopted Elliot's and Galt's view of 1861, and declared that every removal of restrictions between Colonies was an advance of Free Trade: the Board had once again taken the particular rules which applied to Great Britain and erected them into a universal system. Further, he could not feel that the argument based upon the effect of differential duties had a great deal of substance: not enough, at any rate, to forbid an occasional relaxation of the general rule. He held that the 'most favoured nation clause' applied only to other countries and did not apply to preferences given to sister colonies. The permanent Under-Secretary expounded his views a little hesitantly, but clearly enough to make Buckingham and Adderly express their wish that the Tasmanian Act at least could be allowed.[1] The legal difficulty, however, proved insurmountable.[2] Notwithstanding Disraeli's acceptance of free trade in 1853, the Conservative party's economic views were still open to some suspicion, and a minority Conservative Government did not feel itself able to apply to the House of Commons for a repeal of the differential clause. The sanction of the Riverina agreement, however, and the Secretary of State's assurance that pleas

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1. C.O.201/544 Farrar to Under Secretary of State, C.O.5 May 1867. Minutes by Adderley 30 May 1867 and Buckingham 13 December 1867 and 16 December 1867.

2. Ibid. Draft Buckingham to Officer Administering the Government No.1, 5 Jan.1858. C.O.280/372 Buckingham to Gore-Browne No.14, 5 January 1858.

for individual relaxations would be carefully considered, showed that the Colonial Office was tending towards the same liberalism in commercial affairs to Australia as it had already extended to the North American provinces.

The progress towards colonial fiscal autonomy in these years was steady, and pointed directly towards the repeal of the clause forbidding Australian differential duties in 1873 and the acceptance of Canada's "National Policy" of protection in 1879. In the Colonial Office, the permanent officials had been first to realise that it was useless to oppose protective tariffs. It is true that in his lectures Merivale included customs duties among the Imperial interests a Governor must watch over.[1] But his general attitude shows that he did not believe the Governor should do more than try to persuade his ministers to redress any injuries to British manufacturers. The officials were on the one hand immune from the pressure of constituents and Members of Parliament representing industrial areas. On the other, from their wider experience of colonial determination, they were ready to accept commercial policy as simply one more subject on which, if controversy should arise "we shall assuredly be beaten". But for Elliot and Rogers at least, this attitude was not one of mere acquiescence. They were coming to believe that the Imperial Government lacked the right, as well as the power, to intervene in the fiscal affairs of self-governing colonies.

1. Merivale, op.cit., page 248.

Chapter VII

Law and the Administration of Justice.

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In theory there was no difference in the character of Imperial legislative authority over the responsibly-governed colonies and over the rest of the Empire. It was all-embracing, and involved both an enacting and a restraining power. Acts of Parliament over-rode colonial acts, while the Queen retained her prerogative of veto. But the principles of responsible government demanded that here this authority must be used with the greatest restraint. In consequence, every act relating specifically to any one of the North American or Australian colonies between 1854 and 1868 was passed in response to the wishes of at least a section of the colonists. The confirmation of the Reciprocity Treaty by the colonial as well as the Imperial legislatures, and the withdrawal of Newcastle's Native Council Bill,[1] show how it was generally recognised to be expedient and right for colonial wishes to be taken into account in legislation.

The use of the power of reviewing colonial laws is less easily dismissed. As we have seen, the

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1. See below pages 189, 190.

Colonial Office was reluctant to take the extreme step of disallowing them, even when they ran counter to Imperial interests. It was almost equally unwilling to do so when they contained legal or constitutional defects. The more usual course was to request the legislature to amend them, and if the colony refused, the veto was only exercised in the more serious cases. There are many instances of the Office pointing out minor defects in laws and suggesting better ways in which the assemblies, if they wished, could effect their own purposes.[1] These, however, tended to grow less, and in 1867 Rogers discouraged Holland, the recently-appointed legal adviser, from over-detailed criticism of laws which were purely local in their effect.[2] Rogers' own description of the functions of the Colonial Office was given in 1862:

> "....to see <u>generally</u> what the legislature is about....and <u>particularly</u> whether it touches Imperial interests, leaving all responsibility for workmanship, colonial expediency and even justice among colonists with the local legislature." 3

But in 1855 it was finally decided that this general attitude was not to be translated into a legal

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1. See for example C.O.234/3 Bowen to Newcastle No.52, 6 Sept.1861. Draft Newcastle to Bowen No.4,22 Jan.1862.
2. C.O.13/121 Daly to Carnarvon No.2, 17 Jan.1867. Note by Rogers on Holland's' minute.
3. C.O.201/523 Young to Newcastle No.95, 20 Oct.1862. Minute by Rogers.

renunciation of the Crown's right to interfere with colonial laws. The colonists of New South Wales and Victoria had embodied their grievances upon this head in their Constitution Acts by providing that the Governor should give final assent to laws affecting local matters, and that only acts touching Imperial interests should be capable of being reserved or disallowed.[1] The principle, although not the method, was warmly supported by Colonial Reformers in England. "It was a monstrous thing", declared Adderley, "that British subjects should thus be subject to two sovereigns."[2] But the permanent officials in the Colonial Office did not believe the abolition of the Imperial power of reviewing laws to be the natural outcome of self government. Elliot was moved to indignation at the "efforts of politicians to reduce almost to a nullity the ties with the mother country".[3] Something of the same spirit animated Rogers' description of the clauses as " a declaration of legislative independence", the result of "successive Secretaries of State currying favour with the Australian colonies."[4]

The final Cabinet decision was made in the light of a

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1. C.O.201/468 Fitzroy to Newcastle 29 Dec.1853,No.165.
2. Hansard,3rd series,Vol.cxxxviii,col.1758 (21 June 1855).
3. C.O.309/25 Hotham to Newcastle No.79, 26 June 1854. Minute by Elliot 2 Oct.1854.
4. Marindin, op.cit.,page 157.

report which he wrote in September 1854.[1]

He first made clear his reasons for retaining the rights of the Imperial government. He readily admitted that two of the traditional ones might be ignored. There was no need to safeguard the colonists against the mistakes of their own assemblies, if they were sufficiently mature to be granted responsible government. In the same way, the Home Government need no longer protect unrepresented classes against an oligarchy, since the new electoral laws would give the franchise to almost all the white population. But the possibility of "palpably immoral" acts remained, such as acts allowing polygamy, encouraging "kidnapping from the coat of China", or repudiating a public debt due to English capitalists. He used these extreme cases to underline his point that it would be a very grave matter for the Home government to abandon all power over laws dealing with unrepresented aborigines or coloured immigrants.

His second reason lay in the difficulty of making a proper division between Imperial and local subjects. The lists of Imperial matters proposed by New South Wales and Victoria he considered to be far too short. They embraced questions of allegiance, naturalisation,

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1. C.O.323/77 Rogers to Merivale 6 September 1854.

treaties and intercourse with foreign powers, the employment of land and sea forces, high treason, and, in Victoria, divorce. Rogers admitted that a substantial identity of interest might prevent the colonists from injuring the mother country in such ways as prohibiting the importation of British goods, or closing their ports to naval vessels. But relations with foreign countries might be endangered by acts depriving foreigners of civil rights, or a particular foreigner of an award made by a court of justice. He concluded that, no satisfactory list of either colonial or Imperial subjects could be compiled.

He suggested that if the principle of subjecting acts of Imperial interests alone to disallowance was accepted, the Colonial Office might, as hitherto, receive all colonial laws for review. But should the colonists object to an exercise of the veto, the act should be referred to the Judicial Committee of the Privy Council, which would confine itself to deciding whether Imperial interests were involved and would ignore the policy or propriety of the provisions. But this was an incidental and tentative proposal, not, as Professor Knaplund implies, his major recommendation.[1] It might have removed colonial suspicion, but it was a cumbersome,

1. Knaplund, Gladstone and Britains' Imperial Policy, page 74.

scheme, and, assuming that the practice of referring acts to different departments was continued, offered possibilities of irritating delay. It is clear that Rogers preferred the simple course of exercising the existing authority in the traditional manner, but with great moderation. He pointed out that the colonists' grievance might be removed by publicly announcing that colonial acts would not be interfered with except on account of "some flagrant immorality or injustice to those whom the Crown was bound to protect, or in defence of Imperial interests."

Rogers greatly exaggerated the danger of the possible tendencies of colonial legislation, as he himself was aware. But he was quite right in realising that it would be unwise to make any arbitrary and inelastic division between subjects of Imperial and colonial interest. Merivale concurred in this, pointing out the disadvantage to the colonists. Where his colleague stressed these to the mother country,[1] Although Molesworth and Gladstone did not easily abandon the struggle, Grey and Russell decided at the beginning of 1855 not to make any formal change in the

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1. C.O.201/492 Dean Thomson to Merivale 5 June 1855.
Minute by Merivale 6 June 1855.

method of dealing with colonial laws.[1] Historians have agreed that this decision left the way open for the executive to acquiesce in the gradual extention of the sphere of colonial interests. Molesworth would have made such an extension impossible. In his anxiety to make the colonists secure in their control over local affairs, he wished to forbid the Imperial Government to legislate upon or interfere with colonial subjects, and equally to forbid colonial assemblies to legislate upon Imperial subjects.[2] Adderleys' solution was better in that it was a little more flexible.[3] He suggested that the Governor himself should decide whether each act presented to him was local or imperial in character, and accordingly give his final assent or reserve it. But this would have been too heavy a burden for almost any Governor. It would have been difficult for him to resist local pressure, even if Imperial interests were prejudiced. On the other hand, if he took too comprehensive a view of them, he might engage in constant conflict with his ministers, which would impair his usefulness as a

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1. Gladstone Papers 44744. Memorandum by Gladstone 20 Dec.1854.
2. H.E.Egerton, Speeches of Sir William Molesworth, p.p.299 ff., 380-2.
3. Hansard, 3rd series, vol. CXXXIII col. 1973.

constitutionak governor. Russell too hastily brushed aside the contention that the prerogative did on occasion cause hardship. But his decision was justified not only by the ultimate result, but by the calmness with which the colonists received it. Moreover, Merivale showed that he possessed a greater appreciation of the colonists' feelings than Rogers at this time. In drafting the dispatches he left out any reference to "immoral legislation", and simply assured them that the Government recognised in practice the principle which they had advocated.[1]

This implied promise to dissociate the Colonial Office from local legislation was reflected in changes in the forms used in dealing with Australian acts. In 1854 on Merivale's suggestion, laws were no longer "confirmed" but, as in North America, was "left to their operation."[2] This was intended to emphasise that the assent given by a governor was not provisional in the old sense of requiring Imperial approval, but was final, subject to the remote contingency of disallowance.

Nine years later Rogers took a further step in the same direction. He thought that custom had given the expression "leave to operation" something of the meaning

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1. C.O.309/24 Latrobe to Newcastle 25 Mar.1854. Draft Russell to Notham No.36, 20 July 1855 (Merivale's draft).
2. C.O.209/125 Wynyard to Grey No.112, 23 Oct.1854. Minute by Merivale.

of a positive sanction which was even more inappropriate in 1863 than it had been in 1854.[1] Quite apart from the policy of non-interference, the members of the Office were by no means always able to judge the merits of legislation, since the colonial law officers were tending to fall out of the habit of furnishing detailed reports upon every act. In consequence Rogers suggested that the words "Her Majesty will not be advised to exercise her prerogative of disallowance."

So negative a formula was very useful when, for instance, the Office did not wish to interfere with a particularly harsh Queensland act for the suppression of bushranging - " a violent and extraordinary remedy for a violent and extraordinary disease" - yet wished to show the absence of Imperial responsibility.[2] On occasion even this was not felt to be enough, as when the New South Wales legislature refused to amend its Sedition Act of 1868. Rogers disapproved so strongly of rendering a man liable to imprisonment for "avowing a determination to refuse to join in any loyal toast" that it was expressly stated that the formula must not be held to indicate approval.[3] Again, if a law

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1. C.O.201/523 Young to Newcastle No.95, 20 Oct.1362. Minute by Rogers.
2. C.O.234/16 Bowen to Cardwell No.49, 18 Aug1866. Minute by Rogers (undated).
3. C.O.201/456 Belmore to Buckingham No.29, 25 March 1868. Draft Buckingham to Belmore No.40, 30 May 1868. C.O.201/457 Belmore to Buckingham No.83, 12 Aug.1868. Minute by Rogers. Draft Buckingham to Belmore.

were technically faulty, it became the practice to avoid using the name of the Sovereign. A Queensland act of 1862, for example, required doctors with English qualifications to register them before practising in the colony, thus conflicting with an Imperial act authorising them to practise throughout the British dominions. Rogers considered the act eminently reasonable, and it was left officially unnoticed, and became in the normal way incapable of disallowance after two years.[1] Since it was repugnant to the Imperial law, it was open to any one who felt aggrieved to resort to a court of law. If he did not, the act would remain in force in the colony, notwithstanding its rather doubtful legality. In this way the Queen was dissociated in all but the strictest legal sence from colonial laws. This was a result which Carnarvon ten years before had though could only be achieved if an objectionable act were disallowed once, before assent was given to a re-enactment - a proceeding which could not fail to rouse resentment. Although alterations in form were in themselves insubstantial, they offered a means whereby the legislative autonomy of the colonies could be substantially increased.

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1. C.O.234/6 Bowen to Newcastle No.35, 10 July 1862. Minute by Rogers. 21 and 22 Vic.cap.90.
2. C.O.323/87 Rogers to Merivale 21 Sept.1858. Minute by Carnarvon 6 Oct.1858.

In considering the attitude of the Colonial Office towards legislation which was apparently of local interest, it must be emphasised that the fundamental issue was the Imperial interpretation of the extent of the power to make laws for the "peace, welfare and good government" of the colonial community. This problem of the constitutional limitations upon colonial laws was continually before the Office in one shape or another. Even in the instance of extra-territorial jurisdiction, where the ruling was clear, it did not resort summarily or automatically to the veto. Merivale advised that when the power was assumed in a single clause the assembly should be requested to amend it, instead of the entire act being disallowed. This practice was followed throughout the period. Thus Nova Scotia was required to alter a section of the New Practices Act which made forging an affidavit abroad punishable as a felony, and South Australia to alter a section of the act to consolidate the laws relating to Insolvent Debtors, which ordered the real property outside the colony possessed by a bankrupt to be vested in his assignees.[1] In contrast, a Prince Edward Island naturalisation act which did not expressly confine its

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1. C.O.323/84 Rogers to Merivale 4 Dec.1857. Draft Labouchere to Le Marchant 5 Dec.1857. C.O.13/98 Kelly and Cairns to Lytton 29 June 1858.

provisions to the colony was considered ultra vires in its entirety and disallowed.[1] But the Office made a further distinction in its methods of dealing with this type of act - a distinction between the most inconsiderable and the greatest of the responsibly-governed colonies. The whole purpose of a Canadian Act of 1861 was to claim extra-territorial jurisdiction, since it authorised Canadian Courts to punish offences committed in New Brunswick. But respect for Canadian opinion made Rogers advise the Secretary of State to fortify himself with the opinion of the Crown Law Officers before refusing assent, to invite the legislature to repeal the act instead of disallowing it, and to draft a dispatch which Newcastle and Fortescue rejected as too apologetic, although they concurred in the general course.[2]

Rogers' attitude, however, was not entirely the result of care for Canadian sensibilities. He fully sympathised with the object of the act, and he was coming to believe that the rule against extra-territorial jurisdiction was confining the colonies too narrowly. But his attitude was not very clear

1. C.O.323/87 Rogers to Merivale 21 September 1858.
2. C.O.42/627 Head to Newcastle No.71, 9 Sept.1861. Minute by Rogers 15 Oct.1861. C.O.42/630 Atherton and Palmer to Newcastle 8 Nov.1861. Minutes by Rogers 16 Nov.Fortescue 18 Nov. and Newcastle 19 Nov.1861.

upon the subject of local naval defence, where the difficulties involved in the restriction were particularly apparent. The two wealthiest colonies had been driven by the Crimean war and the French threat of 1859-60 to enact measures on the subject. But the acts of New South Wales of 1858 and of Victoria of 1860 had been vetoed, since they allowed the commanders to exercise authority beyond the three mile limit.[1] While the law remained in its present state, the vessels belonged to purely colonial forces and would not be recognised as ships of war by foreign nations. It was the unanimous opinion of the Law Officers that they would have to be commanded by Officers holding commissions from the Crown and to be an essential part of the Royal Navy.[2] The Admiralty refused either to detach part of the navy permanently or to station ships in Australian waters in return for colonial contributions.[3] It would lead to divided command, since the officers would be responsible to Whitehall while their colonial paymasters would also demand obedience. The Imperial Government would not in reality be able to count this force as part of its disposable strength. But like the Commons, the Admiralty

1. C.O.323/82 Wool to Ball 15 April 1858. C.O.309/51 Barkly to Newcastle No.55, 11 June 1860. Minute by Cox 16 June 1862.
2. C.O.309/53 Admiralty to Colonial Office 25 Dec.1860. Encl. Harding, Bethell, Atherton, Phillimore and Collier to Somerset 21 Dec.1860.
3. C.O.309/58 Admiralty to C.O. 26 Dec.1861.

was anxious to cut down expenditure.[1] It suggested that a local force should be authorised, entitled the Royal Colonial Navy of Victoria, its officers commissioned by the Queen, paid for an manned by the colony, and with the duty of protecting the coasts and harbours. In peace, it would allow the number of naval vessels to be diminished, and in war release them for more active operations. An Imperial act should be passed enabling not only Victoria but any colony to create such a force.

The Admiralty thought that it should be recognised by Foreign Governments, but other wise left the question of status obscure. Elliot faced it squarely. A fleet confined to territorial waters would be as "helpless as unnatural".[2] Rogers was less explicit. He seemed to oppose the idea when he wrote at the end of one minute: "might it be said that the Victorians might equip vessels to serve only within these miles of their own coast?"[3] But this might have been written out of deference to Newcastle's opinion, and possibly to encourage him to take some steps, since six months had elapsed since the subject had been last considered.

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1. Hansard, 3rd.series, Vol.cxLix cols.1292-4, 1302-3. C.O.309/53 Romaine to Elliot 22 March 1860.
2. C.O.309/58 Admiralty to Colonial Office 26 Dec.1861. Minute by Elliot 7 January 1862.
3. C.O.309/51 Barkly to Newcastle No.55, 11 June 1860. Minute by Rogers 10 June 1862.

Again, he might not have intended to refer to the proposed Imperial act, but to suggest that the intimation of the powers which she at present possessed might accompany the disallowance of the Victorian act. In the following year he wished to give the colonies jurisdiction "over sea and frontiers", but it is not clear precisely what that expression implied. It is certain, however, that Rogers, like Elliot, was ready to accept the encouragement to independence, which they believed the creation of a colonial navy to involve. Neither welcomed it, and with something like relief concluded that the act would probably become a dead letter, except perhaps, for Victoria. But the Admiralty's refusal to sanction any other system, and the possibility of an American war, made it seem out of the question to deprive a colony of defence.

Newcastle, however, was less alarmed about Victoria's problematical danger or the unwisdom of rejecting a colony's offer to defend herself, than about the growth of independence. This was more to him than a matter of mere regret, and after a little hesitation he opposed the discarding of the bond of naval protection.[1] The matter rested until Cardwell became Secretary of State. At this time there was

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1. Minutes by Newcastle on C.O.309/58 Admiralty to C.O. 26 Dec.1861. (8 Jan.1862) C.O.309/53, 25 Dec.1860 (14 Jan.1861). C.O.309/51 Barkly to Newcastle(20 June 1862

some apprehension in Victoria and South Australia about Russian designs if war should break out in Europe, and Rogers pressed for a decision upon both naval and military assistance to Australia.[1] Cardwell declared that the major political objection was non-existent; in the same way, any step which "increases the wealth or enhances the strength of a colony is a step towards independence."[2] He set himself to reconcile the opposing practical and constitutional views. He found the solution in extending the Royal Naval Reserve act of 1859,[3] to the colonies. In peace the force would be entirely local but in war would pass into the control of the Admiralty and become part of the Imperial navy. It was perhaps strange that none of the members of the Colonial Office had suggested earlier a plan so closely analogous to the procedure of the militia. But they were pre-occupied with the precedent of the Indian Navy, and the Admiralty had not given the impression that any scheme which involved colonial payment with its own responsibility would be accepted. Cardwell's scheme embodied in the Colonial Naval Defence Act of 1865,[4]

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1. C.O.309/67 Darling to Cardwell Confidential 25 July 1864. Minute by Rogers 14 Sept.1864.
2. Ibid. Minute by Cardwell 23 Oct.1864.
3. 22 and 23 Vic., cap.40.
4. 24 Vic., cap.14.

avoided the question of extra-territorial authority, since it was in war that a force confined to territorial waters would have most deserved Newcastle's epithet "useless". No provision for jurisdiction even over its own forces beyond the limits of a colony was made until the Army Act of 1881.[1]

In contrast to this limitation, in 1854 some confusion surrounded the colonists' right to enact laws not repugnant to the laws of England. In Canada it was clear enough, since the third clause of the Constitution Act laid down that laws should not be deemed repugnant unless they conflicted with Imperial statutes applying expressly or by necessary intendment to Canada herself.[2] For all practical purposes the Colonial Office applied this definition to all the responsibly-governed colonies. In 1861, Rogers believed that the time was ripe to extend the ruling formally to them by an Imperial act, although he doubted whether Parliament would consent.[3] It is true that in 1861 he had considered that conflict with the "fundamental principles of English law" would

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1. Keith, op.cit.,(1928) Vol.1,p.331.
2. 3 & 4 Vic.cap.35. s.3.
3. C.O.13/108 Messrs.Burgoyne to Newcastle 21 February 1861. Minute by Rogers.

constitute repugnancy, and the Crown Law Officers agreed.[1] But this was hardly a serious consideration, since neither he nor they could quote any more likely examples than laws denying the sovereignty of the Queen, allowing slavery or polygamy, prohibiting Christianity or allowing punishment to be inflicted without trial.

Another view of repugnancy, persistently preached by Mr. Justice Boothby of South Australia, held that it also consisted of departure from the generally-followed, but non-fundamental, rules of English legislation. He declared the colonial Real Property Act of 1858 was invalid, since inter alia it introduced a method of land transfer unknown to English law.[2] Neither Rogers nor his predecessors had entertained this conception of repugnancy. To adopt it now, as the under-secretary observed, would be disasterous, and "masses of laws" would become invalid. He regarded the Real Property Act as a "hopeful experiment", well-fitted for the circumstances of a young community. He felt no hesitation in leaving it in operation, nor in permitting the introduction of similar laws in Victoria and Queensland.[3]

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1. C.O.13/106 Macdonnell to Newcastle No.518, 25 Sept.1861. Minute by Rogers 2 Nov.1861. No.527,5 Oct.1861.Draft Rogers to Crown Law Officers 2 Jan1862. C.O.13/110 Atherton and Palmer to Newcastle 12 April 1862.
2. C.O.13/106 Macdonnell to Newcastle No.517,6 Aug.1861.
3. C.O.13/97 Macdonnell to Labouchere No.221, 11 Feb.1858. Draft Labouchere to Macdonnell 10 May 1858,No.15.C.O.13/99 Macdonnell to Lytton No.291,17 Jan.1869.Minute by Rogers.

Boothby's action in bringing the issue of repugnancy from its "decent obscurity" was at first a comparatively minor part of his search for defects in the laws of South Australia - a search which promised to be successful enough to make a valid law the exception rather than the rule in the colony. But it was potentially dangerous. Apart from the confusion it caused in South Australia, his view was shared by so eminent a lawyer as Sir Hugh Cairns, the Solicitor-General in Derby's ministry of 1858-59 and a future Lord Chancellor.[1] Unless the customary Colonial Office definition were established by Act of Parliament, other colonies might be affected. Newcastle was not anxious to bring in a general measure. But in 1863, when two Imperial acts giving retrospective validity to the South Australian Constitution Act and all the actions of the legislature had failed to quiet Boothby's objections, he agreed to bring in a bill in the following session to define the powers of assemblies more closely, and so remove the need for "further patching".[2]

1.C.O.13/108 Burgoyne to Newcastle 21 February 1861.Encl.

2.C.O.13/113 Atherton & Palmer to Newcastle 13 May 1863. Minutes by Rogers 10 June 1863 and Newcastle 14 June 1863.

Cardwell eventually sponsored the Colonial Laws Validity Act of 1865. It once again declared South Australian laws to be valid, but other provisions were of general interest to the colonies as a protection for them against a future Boothby. The right of the legislatures to amend their own constitutions was affirmed, unless, of course, they had been established by Act of Parliament. This was designed to encourage the colonies to repeal the special conditions, such as the concurrance of unusual majorities, necessary for some classes of legislation, since neglect of such conditions had proved a fruitful source of query for the judge. Colonial power to set up Courts of justice was re-asserted, because he had not considered it implied in the power to make laws for "peace, order and good government". His worst error was corrected by the clause stating that a Governor's disregard of the royal instructions on reservation did not invalidate an act. But the most important part of the Imperial Act was the clause adopting the doctrine of the Canadian Constitution Act upon repugnancy. It was well at the time to place beyond doubt the established practice of the Colonial Office in these matters. But the definition of repugnance proved to be a limitation upon Colonial powers, although it might appear to be an

extension. It could not be tacitly ignored in the way in which the Office had ignored the more comprehensive interpretation. The decreasing number of Imperial statutes relating to the colonies, however, helped to prevent the act from imposing a real check upon colonial autonomy. The act was also significant in another sense. The draft was circulated to the Australasian colonies for suggestions and comments.[1] Several minor alterations were adopted, while the more substantial additions proposed was already provided for, or the colonists were already competent to effect them. It is true that this step, like the Act itself, was dictated by expedience. Nevertheless, it emphasised the willingness of the Office to co-operate with the colonies and to make sure that they were able to take full advantage of the opportunity of Imperial legislation.

The truth of Latham's comment upon the act is obvious:

> "the only great statute of general imperial constitutional law passed in the nineteenth century was ..... occasioned not by any desire of the Imperial government to clarify or amend, but by its necessity of upsetting the eccentric decision of a colonial judge."[2]

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1. C.O.13/116 Palmer and Collier to Cardwell 28 Sept.1864. Draft - Circular Confidential 26 Oct.1864.
2. T.E.Latham, The Law and the Commonwealth, in Hancock, Survey of Commonwealth Affairs, p.512.

Yet there was a mind in the Office anxious to clarify and amend. The Colonial Laws Validity Act as it finally emerged was only part of a plan to "declare the constitution of colonies possessing Responsible Government" which Rogers had been pressing since 1863. Newcastle showed little enthusiasm, but he authorised the employment of a conveyancer to draft a bill.[1] Four months after he came into office, however, Cardwell put an end to the design.[2]

Rogers had a double purpose: on the one hand to secure convenience and uniformity, and on the other to define the authority of the legislatures. To gain the first, he proposed that all statutory provisions concerning the sanction, reservation or disallowance of acts should be repealed. They should then be re-enacted in his measure "(being a place in which any body would expect to find them)", and would no longer be"scattered throughout the statute book." At the same time a new clause would abolish the troublesome practice of sanctioning North American and West Indian Acts by Order-in-Council. For

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1. C.O.13/113 Atherton and Palmer to Newcastle 13 May 1863. Minute by Newcastle 14 June 1863. C.O.309/64 Darling to Newcastle No.22, 23 Nov.1863. Minute by Rogers 25 Jan.1864.
2. C.O.323/276 Rogers to Reynolds 2 July 1864 and copy Haddon to Rogers Private 21 July 1864. No copy of the draft bill appears to exist in the Colonial Office records. It is possible that there is one in the records of the Treasury Solicitor, but these are not open to the public and I was not given permission to consult them.

the same reason he would insert in his act the powers given to the Governors of the North American and Australian colonies by their commissions, for the most part a delegation of royal authority enabling them to perform the functions assigned to them in local laws. This would get rid of the trouble and expense of issuing Letters Patent to each governor. At the outset, this was the only way in which Rogers meant to define the position of the Governor. But his intention was changed at the end of 1863 by a report upon the state of the militia in Victoria. He drafted a clause giving the Queen's representative absolute power to make regulations for the conduct and discipline of the militia and to appoint officers.[1]

Rogers' second aim - to give "large and clear" powers to the assemblies - was more important. He included all those later enumerated in the act of 1865, and also give others. The legislatures might enact rules for removing judges by any methods they pleased, so long as they provided for an appeal to the Privy Council against the dismissal. This could only be omitted if they proposed that the Queen in her discretion should remove judges upon address from both Houses. This clause enabled the colonists to escape from the limitation of "Burke's Act",[2] which authorised the Governor to

1. See above page 116.
2. 22 Geo. III cap. 75.

"amove" a judge, subject to an appeal to the Privy Council. In effect, however, it was necessary to prove the judge guilty of inefficiency or incapacity in his legal pronouncements if the Council were to uphold his "amotion" under this act. The permanent under-secretary undoubtedly hoped that the legislatures would make use of the new authority instead of addressing the Queen, and so relieve the Office of the embarrassing task of deciding the question. Rogers did not explain his ideas upon the other subjects by a draft clause. But it may be assumed, in view of the attitude of the Office towards the Quebec Resolutions that he intended to confirm the royal prerogative in dealing with pardons. His third point was the grant to the assemblies of "jurisdiction over sea and frontiers". He almost certainly meant to give them authority over their own officers acting in a neighbouring province, and over officers and men in their own commercial shipping.[1] The latter were now subject to the Imperial merchant shipping Acts, although the colonists had regulated their coasting trade since 1854. But it is not possible to decide whether Roger's contemplated extending colonial jurisdiction over armed ships, or whether this were still to be limited,

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1. These were the powers he wished in 1861 to be given to the colonists. C.O.42/627 Head to Newcastle 9 Sept.1861. Minute by Rogers.

to territorial waters.x His motive in bestowing power over boundaries is clear. In a dispute, the provinces would be able to constitute a commission of enquiry, by local act, and could ratify its decision in the same manner. It would be a further way of avoiding Imperial legislation. Rogers was evidently doubtful about defining authority over ecclesiastical affairs, his last subject. The Privy Council had not yet given its final decision on the validity of Letters Patent in a self-governing colony in the case of Bishop Colenso. It is probable that he designed to clarify the powers of the legislatures in authorising the clergy to meet in synod to make regulations for the organisation of the Church.

Cardwell's reasons for abandoning Rogers' project can only be conjectured. He was certainly not anxious to introduce general legislation, and did not give his consent to the modified bill until October 1864,[1] when the Crown Law Officers insisted that the question of repugnancy must be clarified by an Imperial act. He may have considered the legal difficulties insurmountable. But the most probable explanation lies in his "dread of a parliamentary scrape."[2] He could be sure that Adderley and Mills would denounce the comprehensive measure

1. C.O.13/116 Palmer and Collier to Cardwell 28 Sept.1864.
2. Marindin, op.cit., page 226.

as undue interferance with the self-governing colonies. The war in New Zealand tended to make all colonial subjects unpopular, and the precarious position of the Government in 1864 would lead the Secretary of State to hesitate before exciting opposition. But he may also have realised the disadvantages of defining by statute a system of government still in a process of evolution. The colonists would have appreciated both the additional powers and their clear statement, but certain features of Rogers' plan offered possibilities of future conflict. One of these was the new restriction imposed upon the removal of judges. Hitherto there had been no explicit compulsion *to provide for an appeal*, whereas Rogers' clause would have precluded change, or at least made it extremely difficult. The danger of Colonial resentment was far less remote regarding the personal authority given to the Governor over the militia. For this reason alone, it cannot be regretted that the permanent under-secretary's labour was wasted. Contemporary circumstances abundantly justified the Colonial Laws Validity Act. But the undoubted merits of Rogers' plan, particularly in simplifying procedure, could not have vindicated it to the same degree.

From the limitations imposed upon Colonial legislatures by the legal principles of extra-territorial jurisdiction and repugnancy, we must turn to the limitations more

directly imposed by the opinions of the Colonial Office. These were for the most part concerned with colonial laws affecting vested interests and property, or discriminating against particular classes. Here the Office assumed something of the same attitude of a protector of minorities as it did when it scrutinized New Zealand acts concerning the Maoris.

But the Office did not consider that its obligations towards vested interests was unlimited. It did not include those which had been established after the inauguration of responsible government. Thus Rogers did not see any reason for withholding the royal assent from a Victorian act of 1860, which abolished the pensions granted to responsible officers by the Constitution Act without saving the rights of the individuals then holding office.[1] He declared that the Imperial Government had had only a nominal part in designing the clause, and, moreover, that political officers knew at the outset that they were embarking upon a perilous career. The salaries of the Governors were the only interests which the Office felt bound to safeguard, although Rogers was a little doubtful whether Judges' salaries ought not also

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1. C.O.309/52 Barkly to Newcastle No.99, 11 Oct.1860. Minute by Rogers 9 January 1861.

to fall into this category.[1] But it was a different matter when interests dated from earlier days. The Office had insisted that compensation must be provided for the holders of appointments which would become political under the new system in the Australasian colonies. In the same way, Merivale agreed with the legal advisers that the New Zealand Land Order and Scrip Act of 1856 must be disallowed, since it prejudiced the rights of the holder of scrip for land bought from the New Zealand company.[2] In 1860 Tasmania's act for abolishing state aid to religion was vetoed, because there was no guarantee that the stipends of present incumbents would be continued.[3] In 1862 Rogers informed the Governor of New South Wales that the Imperial Government would not acquiesce in the Assembly's desire to treat the Church and School Lands as waste lands until provision was made for the individuals receiving incomes from them at this time.[4] But even in cases where interests had been originally acquired through act of Parliament or instrument of the Crown, Rogers interpreted the obligations of the Office as narrowly as possible.

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1. See below p.317.
2. C.O.323/87 Rogers and Murdoch to Merivale. 27 March 1857. Minute by Merivale.
3. Hansard, 3rd. series, vol. CLVI, cols. 1457-1460.
4. C.O.201/519 Young to Newcastle No.72, 21 Sept.1861. Minute by Rogers, 10 Dec.1861. Draft Newcastle to Young Separate 20 Jan.1862.

He declined the petition of the squatters to disallow the Victorian Land Act of 1860, which established free selection and terminated their privileges under the Order-in-Council of 1847.[1] He pointed out that the Order-in-Council had not contemplated the changed political circumstances of the Colony, but the squatters had enjoyed unimpeded occupation of their runs for fourteen years and had been able to purchase a considerable part of them. The Imperial Government could not intervene where the spirit, if not the letter, of the Order had been fully carried out.

Here Rogers' legal judgement was supported by his knowledge of the political situation. Any interferance would not only have harmed Imperial relations, but would have driven the assembly to take more drastic measures against the squatters. This caution was even more urgently needed when the Office was called upon to protect the interests of absentees. Nothing aroused greater resentment in the colonies. In consequence, the members of the Office, from Elliot to Newcastle, united in advising the refusal of the petition of Messrs. Ashurst and Morris of London to disallow a Canadian railway act of 1861.[2] The act stated that any rent or

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1.C.O.309/52 Barkly to Newcastle No100, 13 Oct.1866.

2.C.O.42/631 Messrs.Ashurst & Morris to Secretary of State 20 June 1861,and 10 July1861.Minute by Elliot 13 July1861. Ashurst & Morris to Fortescue,20 July1861.Minute by Elliot 26 July 1861.Ashurst & Morris to Fortescue 2 Aug.1861. Minutes by Rogers 10 Aug.1861, Fortescue 13 Aug,Newcastle 14 Aug.1861. C.O.42/633 Monck to Newcastle No.54, 21 Mar.1862. Minute by Rogers 9 April 1862.

purchase money of land necessary for the railways should be considered part of the expenses of running them and should be deducted from their earnings. The petitioners' view was that the holders of preference bonds were treated unjustly, since the payment of their interest should be the first claim upon the earnings of the railways which would be diminished if the act came into operation. Pointing out that the word used in the act was 'necessary', not 'expedient' or 'advantageous', Rogers considered the case so bad in law that he would not even have submitted it to the Governor for comment, if the firm had not already secured a different opinion from Cairns. Again, his respect for Canadian self government made him recommend that an act concerning the limitations of actions should be sanctioned, although it prejudiced the rights of absentees to some extent.[1] But the disallowance of a Newfoundland act imposing a tax to be paid by landlords - the majority non-resident - showed that in the smaller colonies the rights of absentees were paramount over the claims of self-government.[2]

This was most apparent in Prince Edward Island, where laws against absentee landlords were not occasional incidents of legislation but expressions of the acute social and political problems of the colony. It is

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1. C.O.42/635 Monck to Newcastle No.176, 24 Dec.1862. Minute by Rogers 27 Jan.1863.
2. C.O. 323/87 Rogers to Merivale 21 Sept.1858. Minutes by Merivale 5 Oct., Carnarvon 6 Oct., Lytton 23 Oct.1858.

true that the Colonial Office recognised that this kind of legislation was inevitable while both Council and Assembly were controlled by the tenants, and it had confirmed several acts since 1851 despite the protests of the proprietors. The act of 1852 relating to Small Debts, for example, prevented cases of nonpayment from being frequently brought before the local courts, and forced the landlords to resort to very costly proceedings.[1] Again the Education Act of the same year, although ostensibly a uniform tax upon wilderness and cultivated land, bore most heavily upon the proprietors, since they already paid taxes upon their unoccupied land. But in passing two acts in 1855, the Assembly made no attempt to disguise its intention to penalise the landlords so heavily that they would be willing to sell their rights to the tenants or to the Government.

The Colonial Office accepted Lieutenant Governor Daly's defence of his sanction of the acts.[2] If he had refused, his ministry would have resigned, and he could not have formed another. Moreover, his veto would have been the signal for a whole-hearted revival of the agitation for escheat. But the Office did not accept these reasons as a valid defence of the acts themselves.

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1. C.O.323/75 Rogers to Merivale 23 Sept.1852.
2. C.O.226/85 Daly to Labouchere, No.70, 10 Dec.1855.
   Minutes by Merivale 1 January 1856 and Ball 8 Jan.1856.

The legal advisers recommended that both should be disallowed.[1] Merivale did not immediately agree, although he considered that both acts "try the principle of allowing purely local acts to pass unquestioned to the uttermost."[2] He concluded that one should be allowed, the act for imposing a duty upon the rent rolls of proprietors. There was no absolute injustice in putting special taxes upon the part of the community best able to bear them. But there was no excuse for prohibiting eviction unless the tenant were compensated for his improvement. It altered the terms of contracts, and the tenant might claim compensation for improvements made fifty or sixty years before. Bell, on the other hand, thought that this act was not a measure of confiscation, as Merivale termed it. He believed that the proprietors did not really expect to recover possession, and used the threat of eviction merely to compel the payment of rent.[3] The act removed one weapon for this purpose. Others, however, remained. But paying closer attention to the petitions of the landlords than the permanent under-secretary,[4] Ball was convinced that the other act could not be sanctioned.

It proposed to tax not all owners of land but only owners of leased or rented land, and of these only owners of more than five hundred acres. The tax was to be levied

1. C.O.323/78 Wood and Rogers to Merivale 3 July 1855.
2. C.O.323/78 Wood & Rogers to Merivale 3 July 1855.Minute by Merivale 30 July 1855.
3. Ibid. Minute by Ball 1 Aug.1855.
4. C.O.226/86 Cunard to Secretary of State 16 June 1855. Memorial from Stewart and Wright 4 June 1855.

upon the sum which the proprietor was entitled to receive, not upon the much smaller sum which he actually did receive. Finally the act cancelled contracts between owners and tenants where the latter had agreed to pay all taxes. Molesworth ultimately agreed with Ball, although it is clear that his views upon self-government made him wish to assent to both acts.[1] But after his death, his opinion and those of Ball and Merivale were set aside by Palmerston, who decided that both acts must be disallowed, since they were

> "at variance with the principles of justice and ... the Rights of Property, which are the foundations of social organisation." 2

Molesworth had, nevertheless, accomplished something during his short secretary-ship. He realised that it was not enough for the Colonial Office to disallow acts intended to solve the problems of the Island, however, just disallowance might be. Like the other members of the Office he admitted that the Imperial Government had originally been responsible for the situation. Unlike them he believed that this entailed an obligation upon the Home authorities to rectify that situation. He set himself to fulfil it immediately.

He wished to help the Island by a guaranteed loan to

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1. C.O.323/78 Wood and Rogers to Merivale July 1855. Minutes by Molesworth 13 and 24 August 1855.
2. Ibid. Minute by Palmerston 8 November 1855.

make full use of the Land Purchase act of 1854 for buying out the proprietors. He would even have consented to some degree of compulsion upon them to sell. Although he was not capable of Molesworths' depth of sympathy with the colonists, Ball draw Labouchere's attention to the proposal, and further supplied him with a painstaking and, upon the whole, a fair account of conditions.[1] The consent of the Treasury was secured,[2] and it appeared as though the persistent conflict between the Office and the colony over the character of its legislation would come to an end.

The parliamentary session of 1857 was, unfortunately, too crowded to allow Labouchere to bring in the bill for the guaranteed loan to Prince Edward Island. Stanley introduced it early in 1858, but before it could be read for a second time, Lytton received private information that the financial situation of the Island had deteriorated.[3] He decided that there was no security for repayment, that the Commons would not pass the bill unless he used the figures for 1856 and concealed the later ones, and that the interest upon

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1. Ibid. Minutes by Labouchere 29 Nov. and Ball 10 Dec.1855. C.O.226/85 Daly to Molesworth No.54, 28 Aug.1858. Minutes by Ball 28 Nov.1855.
2. C.O.226/88 Treasury to Colonial Office 6 June 1857.
3. Hansard, 3rd.series, Vol. C L, cols.399-403. C.O.226/89 Daly to Stanley Private and Confidential 9 April 1858. Draft Lytton to Daly Confidential 17 June 1858. Ibid. Sir Graham Montgomery to Lytton Private 15 June 1858.

a loan of £100,000 with a sinking fund of 6% could only embarras the colony further. Although he abandoned the loan and was determined not to countenance spoliation, Lytton was quite sincere in wishing to follow Molesworth's ideas and to solve the land problem. But his knowledge and his insight were inadequate. He had no real conception of the difficulties involved. He relied far too heavily upon the personal influence of George Dundas, whom he appointed to succeed Daly, believing that the colonists were "manageable by a man who would respect property but conciliate numbers".[1] He gave the new Lieutenant-Governor some sound general advice, but had no more constructive suggestion upon paying for land purchase without a loan than "where there is a will, there is a way." [2]

Lytton's decision was made at an inauspicious moment. The disallowance of the two acts of 1855 aroused great resentment and the old suspicions of the influence of the absentees. The two houses expressed themselves with a good deal of dignity in a joint address

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1. Hughuendon Papers. Lytton to Disraeli 14 Dec.1858 and copy Lytton to Dundas 14 Dec.1858.

2. C.O.226/90 Officer Administering the Government to Lytton No.1, 26 May 1859. Draft Lytton to Dundas Confidential 7 January 1859.

to the Queen ".... we offer no complaints against the exercise of the royal prerogative in this matter", but "the people of Prince Edward Island feel degraded below their fellow subjects" when the Imperial Govement preferred to listen to the non-residents.[1] The offer of an Imperial guarantee eased the situation, and the Executive Council took the unusual step of submitting the draft of a Fishery Reserves bill for Colonial Office approval.[2] But this provided an occasion for a categorical statement from the Office that its decision must depend upon the presence or absence of opposition from the proprietors. The Crown had originally reserved to itself land 500 feet above high water mark, but neighbouring landowners had gradually encroached upon it and let it out like the rest of their territories. In 1843 and 1854 the English Law Officers held that the rights of the Queen were not impaired, and the bill proposed to exempt tenants from paying rent for the parts of their holdings lying in the reserves. Merivale objected to the bill rather more strongly than the Land and Emigration Commissioners, since the Crown was not to receive the rents which the proprietors would lose and since a

1. C.O.226/87 Daly to Labouchere No.21.18 April 1856. Encl.14 April 1856.
2. C.O.226/88 Daly to Labouchere No.8, 2 Feb.1857. Draft Labouchere to Daly No.7, 27 March 1857.

surveyor appointed by the local government to determine the amount of land to be exempted from rent would act against the interests of the proprietors.[1] He argued, however, that the bill might be introduced, provided that the Office did not pledge itself to final assent should opposition develop. In the event, the disallowance of the Fishery Reserves act shortly preceded Lytton's refusal to sponsor the guaranteed loan. The result was that escheat was once more openly agitated in the General election in the spring of 1859.[2]

This inspired the Office to do what it could to assist a settlement through the appointment of a commission. It is true that the members resisted the assembly's attempt to fetter the discretion of the Commissioners by conditions which would have ensured a favourable award to the tenants.[3] But they secured the agreement of most of the proprietors, by persuading the colony to accept one commissioner nominated by the assembly, one by the proprietors and one by the Home Government.[4] The Office would not allow the award to be forced upon any landowner who did not consent to the commission, but it warned them that

1. C.O.226/88 Murdoch tmdRogers to Merivale 10 Mar.1857. Minute by Merivale 11 March 1857.
2. C.O.226/90 Daly to Lytton No.17, 30 March 1859.
3. C.O.226/90 Daly to Lytton No.29, 13 May 1859. Draft Newcastle to Dundas No.12, 6 September 1859.
4. C.O.226/92 Newcastle to Dundas No.12, 21 March 1860. Cunard, Montgomery etc.to Newcastle 13 February 1860.

any refusal to concur in it

> "may materially influence the conduct of Her Majesty's Government if called upon to support them hereafter in dispute with the tenants." 1.

Further the Imperial Government was willing to bear one third of the expense of the enquiry.[2] Nor did the Office cease its efforts when the hopes placed upon the commission were disappointed. It would not assent to an act by which the Assembly, in the absence of an award, tried to enforce the recommendations if the commissioners' report in favour of compulsory land selling upon the proprietors.[3] Nor would Newcastle entertain the idea of a guaranteed loan.[4] But he discussed and sponsored a plan for a settlement by land purchase upon the basis of 8 years purchase of the rent due to the proprietor and 8 years of the average rent he actually received. This suggestion was a modification of a proposal of Sir Samuel Cunard and was chiefly devised by Rogers and Murdoch, the Land and Emigration Commissioner,[5] in "one of the

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1. Ibid. Dundas to Newcastle No.56, 1 Oct.1860. Draft Newcastle to Dundas No.45, 2 Jan.1861. P.P.1864 HC/XLI (528) p.p. 9,63.
2. C.O.226/91 Dundas to Newcastle No.21, 8 Aug.1859. Minutes by Merivale 24 Aug, by Newcastle 26 Aug.1859.
3. C.O.226/93 Newcastle to Dundas No.120, 9 Aug.1862. P.P.1864. HC/XLI (528) p.66.
4. Gladstone Papers. 44,623. Newcastle to Gladstone 4 Jan.186[illegible]
5. C.O.226/97 Dundas to Newcastle No.66, 17 Sept.1862. Minute by Rogers 18 Nov.1862. Memorandum Murdoch to Rogers (undated). Cunard to Rogers 12 March 1862. Draft Rogers to Cunard 3rd.April 1862. Draft Newcastle to Daly Separate and Confidential 5 April 1862. Cunard to Fortescue 24 Mar.1862.

ablest reports upon the land question." 1 Although no general settlement proved possible, the attempt probably assisted the progress of purchases from individual landowners. In 1868 Dundas reported that only 450,000 acres remained in the hands of the proprietors.[2] Cardwell had less interest in, and less desire to find a solution for the problem, than his predecessor. He failed to realise the part it played in the refusal of the Island to join in plans for Confederation, which he so heartily condemned.[3] But here to some extent he was misled by Dundas, who believed that the purchase of the Cunard states in 1866 virtually brought the difficulty to and end.[4] In fact nearly ten years passed before it reached a final solution.

The members of the Colonial Office had not shown themselves indifferent to what Newcastle called "this wretched business." 5 But they had treated Prince Edward Island strictly as a responsible Government in the sense that self government implied financial self-reliance, without allowing it similar freedom in legislation. It could not, perhaps, be expected that

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1. C.H. B.E.,Vol. VI,p.366. P.P.1864 H.C.XLI (528) Newcastle to Dundas No.24, 11 July 1863.
2. Ibid.
3. Cardwell Papers P.R.O. 30/48/40 Cardwell to Dundas 7 July 1866
4. Ibid. P.R.O.30/48/45 Dundas to Cardwell 4 July 1866.
5. C.O.226/97 Dundas to Newcastle No.66, 17 September 1861. Minute by Newcastle 23 Nov.1861.

confiscatory acts should be sanctioned, since they were so alien not only to the ideas of the legal members of the Office but also to those of Parliament. There is no doubt that this was the primary reason for the recurrent disallowances. The influence of the proprietors with the Office was very much less than it had been in earlier times, although the importance of Sir Samuel Cunard's wide range of financial and commercial interests, for example, or Sir Graham Montgomery's position as a member of the House of Commons made it politically inexpedient to offend them. But if confiscation were thus ruled out, it would have been no more than justice for the Imperial Government to have given financial help to enable the Island to solve the land problem. Lytton had good grounds for believing that the interest upon a guaranteed loan and the establishment of a Sinking Fund of 6% would have put too great a strain upon the revenue of the Colony. But there is no evidence that the Colonial Office made any attempt to persuade the Treasury to give its guarantee upon easier terms. Although the political and permanent members alike devoted a great deal of thought and energy to the problem during Newcastle's Secretaryship, they did not realise that a scheme of land purchase could not be fully successful in the absence of financial assistance. Molesworth was the only member of

the Office who really understood that the comparatively easy material circumstances of the tenants, with their long leases and low rents, did not make the problem any less serious. In consequence the Office failed to compensate the colony for its unrelenting attitude upon legislation.

The history of the Convicts Prevention Acts in Australia shows how the attitude of the Office changed when more important colonies were concerned, and when there was no persistent, non-resident influence exerted against them. These acts infringed the prerogative of mercy. They prevented the holders of conditional pardons from doing precisely what the pardons entitled them to do - to go where they wished, provided that they did not return to the United Kingdom. Further, the acts discriminated against a particular class of the Queen's subjects. In 1852 Victoria passed her first act to prevent the entrance of convicts "illegally at large", and to imprison and punish severely all those found within the colony. The term included all ex-convicts, except those whose sentences had been remitted. Taking its stand upon the prerogative, the Colonial Office disallowed the act on 30 September 1853.[1]

1. Superintendent La Trobe in fact decided not to publish the disallowance, and the act remained in operation until it expired in November 1854.

But the Office was aware that the presence of convicts on the Victorian goldfields presented a social problem which threatened to turn the existing disorder into chaos. Governor Hotham was instructed to propose a more moderate scheme, through which conditionally pardoned men could be kept under constant police supervision, although they must be allowed to retain their liberty. But at the same time he had been commanded to release men imprisoned under the Victorian act. When this became known, the intensity of feeling in Victoria led to an act even more stringent in its terms than the first.[1]

Once again, there was no divergence of opinion in the Office. The act must be disallowed. But, in deference to Hotham's plea of emergency and his threat that "Victoria possesses the wealth and strength to stand unaided: she does not lack the pretension to walk alone," it was agreed that time should be given for another law to be enacted before the present one was vetoed.[2] Such a law might contain provisions laying heavier penalties upon crimes if the offender had ever been a convict. It might even exclude holders of conditional pardons from the actual Goldfields, but

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1. C.O.309/27 Hotham to Newcastle No.150, 18 Nov.1854. C.O. 280/317 Denison to Newcastle 15 March 1854. Minute by Grey 18 June 1854. Draft Grey to Hotham No2, 24 June 1854.

2. C.O.309/27 Hotham to Newcastle 18 Nov.1854. Draft Russell to Hotham No.19, 4 June 1855.

under a moderate penalty. It was impressed upon the Governor that such a law must be confined as far as possible to the neighbourhood of the Goldfields, and that these suggestions represented the utmost concessions which the Office was prepared to make. Nevertheless, the third act passed by the Victorian legislatures was based upon the same principle as its two predecessors.[1]

This brought Merivale to advise Labouchere to make a complete surrender, upon the stark ground that

> "the colonists are absolutely determined to have their own way. No reasoning with them, or suggestion of milder courses, has been or will be of any effect whatever."[2]

He deprecated any idea of commissioning the new Governor, like Hotham to try to negotiate any compromise - the demands of the colonists only increased at each attempt. The Secretary of State agreed that there was no alternative to acquiescence in the invasion of the prerogative. It is true that two other circumstances helped the Office to admit its powerlessness in the face of Colonial opinion. The acts were temporary, and would only be in force for a limited period. Further, at this time Elliot was pressing the abolition of conditional pardons altogether. The idea was abandoned, in case English public opinion should fear that a flood of ex-convicts should pair into United Kingdom. But the

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1. C.O.309/39 MacArthur to Labouchere No144,15 April 1856.
2. Ibid. Minute by Merivale 4 August 1856.

victory of the colonists was confirmed in the next decade, when South Australia and New Zealand passed reserved acts to prevent the immigration of holders of conditional pardons. The intervening years of ... experience of autonomy made Rogers decide that the laws could not be opposed.[1] But the Queen could not be expected to confirm them by her own act, as the reserved acts were not sanctioned. The colonists were told, however, that if they cared to re-enact non-reserved laws, Her Majesty would not be advised to exercise her prerogative of disallowance.

The contrast between attitude of the Office towards legislation in Prince Edward Island and towards legislation in Australia was to a large extent governed by political considerations. But these were not involved in one of the most difficult and complicated subjects of colonial acts, the subject of marriage and divorce. We have seen that departure from the general rules of English law was not considered to be a ground of repugnancy. Yet those rules were the standards by which the marriage and divorce laws of the colonies were judged. Merivale and Rogers were foremost in wishing the colonists to conform to Imperial legislation. As lawyers, they were very conscious of the confusion over legitimacy and over

1. C.O.13/115 Daly to Cardwell No.73, 23 December 1864. Minute by Rogers. C.O.209/178 Grey to Newcastle No.11, 11 January 1864. Minute by Rogers 24 March 1865. Draft Cardwell to Grey No.47, 8 May 1864.

the devolution of property, which might arise from conflicting codes within the Empire. Even the apparently minor question of procedure was involved. Inadequate ruled might cause the validity of marriages to be questioned, and proprerty lying outside the colony might be affected. In additon, the Office was concerned with the social evil of encouraging clandestine and fraudulent marriage. By 1858 the Imperial Government fully admitted that the colonists had the right to empower ministers of any sect to celebrate marriages,[1] although in England a registrar had to be present at every marriage in a non-conformist church until 1898.[2] As late as 1863, however, Rogers had a little difficulty in persuading the Queen's Advocate to consent to Quakers performing the ceremony between persons not belonging to the Society of Friends.[3] In general, the Colonial Office required that the colonies should make clear regulations for the registration of ministers and for fixing the time, place and previous notice needed for marriages.[4]

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1. C.O.42/630 Queen's Advocate to Rogers 23 Nov.1861. Encl.Report 7 July 1858.
2. A.V.Dicey, Lectures on Relations between Law & Public Opinion in English in 19th.C., pp. 346-347.
3. C.O.13/113 Harding to Newcastle 24 July 1863. Minutes by Rogers 10 Aug.1863. Draft Rogers to Harding 15 Aug.1863. Ibid.Harding to Newcastle 25 August 1863. Draft Newcastle to Daly No.37, 10 Sept.1863.
4. See for example C.O.42/630 Harding to Rogers 23 Nov.1861. Enclosing Harding to Merivale 7 July 1858.

It constantly pointed out defects and asked for their amendment, but in 1860 even Tasmania stoutly refused to alter her regulations and pointed to similar ones in force in other colonies.[1]

The Matrimonial Causes Act of 1857[2] greatly increased the danger of diversity, since the colonies inevitably followed the example of the mother country in substituting a general divorce law for procedure by private act. To Merivale, it was

> " a very grave question whether we shall carry our principles of free legislation so far as to allow any province to legislate for itself on a subject such as this." 3

But he answered himself immediately; although a single law for the whole Empire would have been a great boon to the colonists and earlier would have excited little or no jealousy of interference, it was now too late. He suggested that the best alternative would be to send a copy of the act to the colonists and invite them to frame similar acts, explaining the great importance of a common law upon the subject. Stanley accepted the advice with some hesitation, warning him that

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1. C.O.280/349 Harding to Newcastle 19 Jan.1860. Draft Newcastle to Young No 15, 15 Feb.60. C.O.280/348 No.99, Young to Newcastle September 1860. Minute by Rogers 4 Dec.1860.

2. 20&.21 Vic.cap.85.

3. C.O.309/43 Barkly to Labouchere No.121, 7 Dec. 1857. Minute by Merivale 17 Feb. 1858.

"care must be taken to avoid ... giving the appearance of any attempt to dictate".[1] Lytton concurred with his view, although it seems that the actual difficulty of imposing a uniform law weighed less with him than his belief that

> "private and domestic relations such as Divorce etc. should be left as much as possible to the communities which have formed their own politics and know their own social grievances."[2]

The Colonial Office reaction to the answers to its invitation showed how far the colonists were to be allowed to depart from English rules. Already South Australia had been refused permission to legalise marriage with a deceased wife's sister.[3] When Victoria made desertion for four years without reasonable cause a ground for divorce, it was equally considered to be too broad a divergence. Rogers and the Queen's Advocate, Sir John Harding, were completely at one in thinking it could not be sanctioned.[4] It is also clear that assent would have been refused if the Canadian parliament had adopted Head's tentative and unhappy suggestion of a divorce act making a distinction between the two religions.[5] It was to apply to Protestants in the same way as the English law, but in the case of

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1. Ibid. Minute by Stanley 2 March 1858.
2. C.O.42/613 Head to Labouchere No.55, 14 May 1858. Minute by Lytton 8 June 1858.
3. C.O.13/97 Macdonnell to Labouchere No.211, 28 Jan.1858.
4. C.O.309/52 Barkly to Newcastle No.80, 1 Sept.1860. Minute by Rogers 21 Nov.1860. C.O.309/53 Harding to Newcastle 18 Dec. 1860. Minute by Rogers.
5. C.O.42/613 Head to Labouchere No.55, 4 May 1858. In fact, no general divorce law was enacted in Canada in this period.

Roman Catholics was to be confined to civil rights and property, leaving the vinculn matrimonii untouched. On the other hand, Merivale and Harding agreed that South Australia's provision making the condonation of adultery a bar to divorce within the discretion of the court, instead of an absolute bar as in England, was not different enough to justify a refusal to leave the act to its operation.[1] Still less did the Office oppose clauses which at most might have inconvenient results. There was no hesitation in allowing Victoria to excuse registrars, as well as the clergy, from marrying divorced persons, although it might result in persons legally free to marry being unable to find any civil or religious authority to perform the ceremony.[2]

In sanctioning the South Australian act, Merivale addressed an earnest plea to the Governor and ministers for absolute conformity with the England act.[3] He admitted that the South Australian provisions might be better suited to local conditions, or even better in themselves. But he urged that they should be abandoned for the sake of the Empire. This abstention considering the local aspect was not always followed.

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1. C.O.13/99 Macdonnell to Lytton 20 Jan.1859.
2. C.O.309/56 Barkly to Newcastle No.61,10 July 1861. Minute by Rogers.
3. C.O.13/99 Macdonnell to Lytton 20 Jan.1859. Draft Newcastle to Macdonnell (Merivale's draft)

The wise instruction to Head not to publish his proposal was largely dictated by the fear of stirring up religious strife in Canada.[1] In more marked contrast, Rogers and Harding grounded the disallowance of the Victorian divorce act mainly on its "moral and social implications."[2] The permanent Under-Secretary wrote:

> "If there is one country in the world where society is likely to be demoralised by allowing husbands and wives to slip each other off, it is that of the moving and independent population of Australia where everything tempts to desertion.".

His attitude was explicable in view of the feeling which had been aroused by the English act, and had scarcely yet disappeared. But it was not consistent with the policy of allowing experience to teach the colonists the consequences of their legislation. This persistance of concern for the social welfare of the colonies coloured the character of the general Colonial Office policy concerning marriage and divorce laws which emerges. Unsatisfactory rules of procedure met with protest, but not with drastic interference. Laws going further than English laws but in the same direction were acquiesced in, while disallowance was reserved only for those which introduced provisions substantially unknown to the mother

1. C.O.42/613 Head to Labouchere No.55, 4 May 1858.
   Draft Lytton to Head No.7, 14 June 1858.
2. C.O.309/52 Barkly to Newcastle No.80, 1 Sept.1860.
   Minute by Rogers 21 Nov.1860.

country.

The influence of the Parliamentary members of the Office was often evident when colonial laws carried political implications. But it was natural that the majority of decisions were made upon the advice of Merivale and Rogers. Of the two, Rogers was the more prominent, since he was Legal Adviser before becoming permanent Under-Secretary. It is clear neither would have been satisfied by the rigid division between Imperial and local subjects proposed at the beginning of the period. If it had been adopted, it would have modified their actions upon colonial laws to some degree. Both were more anxious in legal than they were in purely political matters to make the Imperial bond a reality. This was, of course, most apparent where laws of marriage and divorce were concerned. Roger's effort fordefinition and uniformity in his draft bill was not altogether wise. But this criticism does not apply to his tactful encouragement to the colonists to refer disputed points of law to the Crown Law Officers in England and to the Privy Council.[1] It was plain

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1. See for example C.O.309/63 Darling to Cardwell No.96, 19 Sept.1864. Minute by Rogers 26 Nov.1864. Draft Cardwell to Darling No.94, 23 Dec.1864. (Rogers' draft).

that colonists would be allowed to make only minor regulations in respect of appeals to the Privy Council.[1] Neither Merivale nor Rogers contemplated any change in its unifying position of supreme judicial tribunal of the Empire.

Nevertheless, in general both permanent Under-Secretaries wished the powers of the colonial legislatures to be as little as possible fettered either by legal incapacity or by the views of the Imperial Government. They tried to perform their functions in the spirit of statement rather than lawyers. They were particularly conscious that the greater colonies could not be forced into an Imperial system. Thus Rogers declared that a previously-unnoticed repugnancy in the Canadian law of medical registration must be acquiesced in, since the Colonial Office could neither force its repeal nor prevent its administration.[2] Again, an Imperial Law upon the admission of attornies should in strictness have annulled the operation of the existing colonial one. But it was merely pointed out that its existence prevented that similarity of practice which it was supposed that Canada desired as much as the mother country.[3] This attitude towards

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1. See for example C.O.42/634 Reeve to Rogers 30 May 1860. Draft Newcastle to Head No.56, 6 June 1860.
2. C.O.42/627 Head to Newcastle No.66, 22 Aug.1861. Minute by Rogers (undated).
3. C.O.42/610 Labouchere to Officer Administering the Government No.44, 21 Sept.1857. (Merivale's draft).

Canada was outstanding only in degree. Merivale and Rogers rarely failed to recognise that colonial laws were designed to meet the needs of each community. They might draw attention to technical shortcomings, but in essentials they considered that here, as in other questions, the colonists were the best judges of their own interests.

II

Rogers categorically placed the administration of justice among imperial interests.[1] But here there were few ways in which the Colonial Office might exercise influence. Appeals could be made from colonial courts to the Privy Council. But, apart from scrutinizing laws, the function of the Office was no more than to act as a liason in this respect. Questions regarding the constitution of colonial courts or the personnel of the judicial benches provided the only opportunities for intervention, and both proved

1. See above page. 112.

comparatively infrequent.

In South Australia, however, the question was raised in 1860 whether the Executive Council continued to possess the right to act as a Court of Appeal, given to it by its early days.[1] Mr.Justice Boothby and Mr.Justice Gwynne denied it, declaring that the change in the character of the constitution annulled the earlier provision. But Boothby himself had caused the revival of the old powers. The judgements which he was giving in the Supreme Court at this time, based upon his views of the invalidity of the Real Property Act, were throwing land titles into confusion. In the eyes of the ministers, they made an appellate jurisdiction within the colony essential, since few suitors could afford the expense and delay of any appeal to the Privy Council. Governor Macdonnell disliked the judicial functions of the Council. But he willingly assented to an act of 1861 which re-affirmed them, on the ground that any Court of Appeal was better than none.[2] His successor disapproved more strongly. Yet, when anarchy threatened to follow the two judges' decision in 1865 that the colony had no

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1. C.O.13/103 Macdonnell to Newcastle No.465, 21 Dec.1860.
   C.O.13/105 Macdonnell to Newcastle No.485, 26 April 1861.
2. C.O.13/106 Macdonnell to Newcastle No.526, 16 Oct.1861.

power to create Courts of law and therefore, in truth possessed none, Daly contemplated resorting to it, and using the extended powers which the Assembly intended to bestow upon it.[1] The arrival of the Colonial Laws Validity Act prevented this for the moment. But ultimately he found himself obliged to preside over the Council acting as a Court of Appeal.[2]

Rogers' attitude was governed by his belief that the exercise of jurisdiction by the Executive Council was objectionable, even in the original circumstances.[3] It was intolerable when the Council was composed entirely of the members of the political party in Office. Partisan feeling would take the place of justice. By its very existence, the appeal would lower the prestige of the judges. This concern for the judges' standing made him oppose a reference to the Crown Law Officers. He considered that the ministers had legal right upon their side. If the Attorney and Solicitor General agreed with him, it would do nothing to increase South Australian respect for the judiciary, while their opinion could have no binding force on the

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1. C.O.13/117 Daly to Cardwell No.42, 26 July 1865.
2. C.O.13/118 Daly to Cardwell No.62, 21 Sept.1865. C.O.13/119 Daly to Cardwell Confidential 27 April 1866.
3. C.O.13/103 Macdonnell to Newcastle No.465, 21 Dec.1860. Minute by Rogers 1 March 1861. C.O.13/105 No.485, 26 April 1861. Minute by Rogers 24 June 1861.

colony. In the hope that the matter might resolve itself if there was a delay, he suggested that the legislature itself should pass an act to remove doubts. Fortescue and Newcastle were unable to see his point about judicial prestige, and insisted upon a reference to the Law Officers.[1] But they agreed with him in pressing upon the Governor the anomaly of a court of law composed of political ministers. They urged the colonists to abolish a court whose decisions must necessarily be political, and they warmly espoused the idea of an inter colonial Court of Appeal in Australia as an alternative. When the colonial act arrived these outspoken opinions were repeated.[2] But, in the face of South Australia's determination and her undoubted legal competence, the members of the Office did not feel that even so distasteful an act could be disallowed.

The attitude of the Office was rather more rigid when an act of 1867 enabled the Governor to appoint a commission to supersede Boothby, who caused the utmost confusion by declining to administer criminal justice on the ground of the invalidity of the appointment of

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1. C.O.13/103 No.465 Minutes by Fortescue 3 March 1861 and Newcastle (undated).
2. C.O.13/105 Macdonnell to Newcastle No.526, 16 Oct.1861, Minutes by Rogers 2 Jan, Fortescue 7 Jan.1862. Draft Newcastle to Daly 20 Jan.1862.

the attorney general.[1] Holland pointed out that it was a dangerous precedent, since it was special legislation against a particular judge and deprived him of civil as well as criminal jurisdiction.[2] It was not a temporary act, but permanent. Rogers was aware of the exceptional difficulty of the circumstances and did not think it was an occasion for expressing censure.[3] But he supported Holland's demand that the act should be amended.

On the other hand, the Office was very willing to assent to a New Brunswick act of 1854 which made drastic changes in the administration of justice. The Court of Chancery was abolished, and jurisdiction in equity was transferred to the Supreme Court. The act involved an infringement of the prerogative, since the Master of the Rolls, whose office was extinguished, had been appointed by royal warrant and during good behaviour. But Wood, the Legal Adviser, Merivale and Grey realised the force of the plea made by Head on behalf of the act.[4] The only appeal from the Court

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1. C.O.13/121 Daly to Carnarvon No.2, 17 January 1867.
2. Ibid. Minute by Holland (undated).
3. C.O.13/121 Daly to Carnarvon No.2, 17 Jan.1867. Note by Rogers on Holland's minute. Draft Carnarvon to Daly No.5, 1 April 1867 and draft Granville to Officer Administering the Government 5 March 1869.
4. C.O.188/121 Head to Newcastle No.20, 19 May 1854. Draft Grey to Head No.8, 18 Aug.1854. Ibid. Head to Newcastle Separate 20 May 1854. C.O.323/77 Wood to Merivale 3 Aug.1854. Minutes by Merivale 14 Aug. and Grey 10 and 17 Aug.1854.

of Chancery, apart from the expensive one to the Privy Council, had lain to the Lieutenant-Governor. He naturally sought the advice of the Common law judges. But they had never presumed to question the decisions of their colleague, and the people of New Brunswick resented the fact that all cases in equity were virtually decided by the Master of the Rolls, whether or not an appeal had been lodged. Now, every type of case might be tried by any judge of the Supreme Court, with an appeal lying to a tribunal of the other four . While the members of the Office were not blind to the probability that much of the discontent arose from the personal unpopularity of Judge Parker, they only paused to satisfy themselves that he had been amply compensated for the loss of his office. Their ready sanction proved that they would not interfere in the constitution of colonial courts, despite its character as a subject of Imperial interest, so long as their ideas of the essential canons of justice were not violated.

In regard to the judges themselves, we have seen that the Colonial Office ceased to support to the Governor's right to exercise his discretion upon their appointment.[1] The members welcomed New Zealand's delegation of the choice of a judge to the Office and

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1. See above page.

and one of the judges at Westminster, and Queensland's to Palmer, the Solicitor-General.[1] They thought that Tasmania was even wiser when she vested the appointment of judges in the Queen, who would, of course act upon the advice of the Secretary of State.[2] Although in almost every case the size of the salary precluded the selection of a lawyer who had a promising career in England, it was hoped that an English barrister would avoid the political partisanship prevalent in the colonial Bars. But the Office did not protest when New Zealand abandoned the practice, and upon occasion neglected to inform the Imperial Government of a judicial appointment.

Merivale and Rogers saw that the fundamental necessity was to insist upon secure tenure for the judges. This included protecting them from any diminution of salary during their period of office. This question appeared only in Queensland, where the position of Mr. Justice Lutwyche was rather curious. A violent partisan of the democratic party of New South Wales, in 1859 he was appointed judge at Moreton Bay. When the outlying district became a new colony, Queensland found

1. C.O.209/137 Brown to Labouchere No.76, 26 July 1856. Minutes by Merivale 12 Dec., Labouchere 16 Dec.1856. C.O. 234/6 Bowen to Newcastle No.35, 15 July 1862. Minute by Rogers 22 Sept.1862.
2. C.O.280/360 Gore Brown to Newcastle No.99, 10 Oct.1863. Minutes by Rogers (undated), Fortescue 28 Jan, Newcastle 29 Jan.1864.

herself "saddled" with a judge whose salary had been fixed by the New South Wales assembly at £2000 a year. He was naturally obnoxious to the squatters who dominated public life at Brisbane, and increased his unpopularity by impugning the validity of the Legislature because of inconsistencies in the constitutional Order-in-Council.[1] It responded by voting him a salary of £1500 upon the ground that the finances of the colony could not bear the larger sum.[2]

Merivale's advice was to resist the decrease "<u>à l'outrance</u>."[3] Rogers had already declined to waive the reservation of bills altering the salaries of judges.[4] But he considered that Queensland had quite a good case in strict law, although she was morally bound to maintain Lutwyches' emoluments. The members of the legislature had, after all, been represented in the New South Wales Assembly and were parties to the original appointment. He did not recommend disallowance, but he suggested that sanction should be delayed and Queenslands' obligations pointed out. Newcastle and Fortescue agreed a little reluctantly.[5] They might

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1. The Imperial Parliament passed an act to cure the deficiencies in 1861.
2. C.O.234/2 Bowen to Newcastle No.82, 4 Oct.1860.
3. Ibid. Minute by Rogers 8 December 1860.
4. C.O.234/1 Bowen to Newcastle No.17, 3 Feb.1860. Minute by Rogers 17 April 1860.
5. C.O.234/2 No.82, Bowen to Newcastle 4 Oct.1860. Minutes by Fortescue 14 February 1861, and Newcastle 17 February 1861.

become impatient with Bowen's garrulity; but he had impressed them with a sense of Lutwyches' unfitness for his post. They would both have preferred to safeguard the bench by allowing the Governor to appoint without the consent of his ministers.[1] They could not see that the salary was an equally important matter. The Legislature, however, acquiesced and a conflict between it and the Office did not materialise.[2]

The Judge continued to question the powers and constitution of the Houses, when they refused to designate him as future Chief Justice, in the Supreme Court Bill.[3] His political opinions continued to be evident. On one occasion he tried a libel case when, Bowen alleged, he was known to be the author of, or at least have supplied the material for, the article in question.

> "..... he presented the public with the unprecedented spectacle of a British judge trying an action for seditious libel in which he himself was the <u>real</u> defendant, and in which he virtually directed the jury to acquit himself." [4]

Holding this opinion, the Governor obviously approved of the discussions about Lutwyches' removal which began

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1. C.O.234/5 Bowen to Newcastle Private and Confidential 16 Nov.1861.
2. C.O.234/4 Bowen to Newcastle No.53,9 Sept.1861.
3. Ibid.
4. C.O.234/4 Bowen to Newcastle Private and Confidential 3 September 1861.

to take place.[1]

Rogers was chiefly responsible for preventing the Governor from committing himself hastily to any action. Bowen was warned in November 1861 that the Office did not consider that Lutwyches' conduct did not warrant exceptional steps.[2] He was told that the Royal Instructions did not give him power to suspend a Judge holding office during good behaviour.[3] If he were 'amoved' under 'Burke's Act', it must be on account of 'legal and official misbehaviour, not mere wrongheadedness or errors of judgement.[4] An address to the Queen for his removal was contemplated, but the opinion of the Crown Law Officers upon Boothby's case, did not encourage Bowen or his advisers to be over-confident of its success.[5] The Crown had a discretion, and would only comply if satisfied that

> "...owing to his perversity or habitual disregard of judicial propriety, the administration of justice might be obstructed by his continuence in office."

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1. C.O.234/5 Bowen to Newcastle Private and Confidential 16 Nov.1861.
2. C.O.234/5 Bowen to Newcastle No.69, 15 Nov.1861. Draft Newcastle to Bowen Separate 27 June 1862.
3. C.O.234/5 Bowen to Newcastle Private and Confidential 16 Nov.1861. Draft Newcastle to Bowen Private and Confidential 27 June 1862.
4. C.O.234/7 Atherton and Palmer to Newcastle 20 Nov.1862. Draft Newcastle to Bowen No.41, 2 December 1862.
5. C.O.13/110 Atherton and Palmer to Newcastle 12 April 1862. Draft Newcastle to Bowen Confidential 15 May 1862.

The attitude of the Colonial Office, probably combined with the hope that the appointment of a Chief Justice[1] would curb Lutwyches' activities, finally induced Bowen to accept the Judge's promise to abandon his partisanship, and the idea of an address was dropped.[2] Rogers had not taken the initiative because he had any patience with Lutwyches' pretensions to the Chief Justiceship, or because he doubted the substantial truth of Bowen's account of the evils caused by a partisan judge. But he was determined that it must be made impossible for a judge to be removed simply because his personality, opinions or judicial decisions were obnoxious to the legislature.

He could not stave off an address from South Australia for Boothby's removal in the same way. It was presented in October 1861, following his persistent attacks upon the Real Property Act and the Constitution Act upon grounds of repugnancy and technical irregularity.[3] Although the Secretary of State was in possession of reports from both Houses, the Addresses contained no reasons for their requests. Macdonnell considered this the "dignified course". It is clear that neither he nor

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1. Bowen, 50 Years of Colonial Government, page 199, Bowen to Palmer 18 August 1862.
2. C.O.234/8 Bowen to Newcastle, No.48, 15 September 1863.
3. C.O.13/106 MacDonnell to Newcastle No.527, 25 Oct.1861.

the Legislature entertained any suspicion that they might be rejected.

But Rogers had no hesitation in assuming that here the Queen must act as Sovereign of the whole Empire, upon the advice of her Imperial ministers, not merely as Sovereign of South Australia upon colonial advice.[1] Newcastle and Fortescue emphatically agreed, and they were supported by the Law Officers. Their opinion upon the merits of Boothby's actions also coincided with the permanent under-secretary's.[2] In some respects, notably repugnancy, he was wrong, but in many others his judgement was sound. The colony was told that the Addresses must be rejected, since they failed to state reasons.[3] But it was indicated that the Imperial Government did not consider that valid reasons for the removal existed. The attempt was renewed in 1866, when the Legislature duly stated its reasons - Boothby's continued challenge of the validity of the laws, notwithstanding Imperial acts, his suspension of criminal justice because of a fault in the office of Attorney General and his persistent refusal to conform himself to the opinions of the other

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1. Ibid. Minutes by Rogers 4 Jan.1862, Fortescue 7 Jan;, Newcastle 13 January 1862. Ibid. No.518,17 Aug.1861. Minutes by Rogers 2 Nov.,Fortescue 22 Nov.,Newcastle 23 Nov.1862.
2. C.O.13/110 Atherton and Palmer to Newcastle 12 April 1862.
3. Ibid. Draft Newcastle to Daly No.565, 24 April 1862.

two judges of the Supreme Court.[1] In the meantime, however, the Privy Council had insisted that Addresses should be submitted to it rather than the Law Officers.[2] Rogers obviously welcomed the delegation of responsibility, and was well satisfied when the colony was informed that it must submit a case to the Privy Council before a decision could be made. With great resentment, South Australia declined to take this lengthy and expensive course.

The Imperial Government made a wise decision in 1862. It is true that Boothby's attack upon South Australian legislation did not begin until the Real Property Act was passed. He was obviously moved by the danger to the legal profession involved in the simplification of the methods of conveyancing. His challenge was intensified after his disappointment at not being appointed Chief Justice. But he succeeded in "uncovering many blots", as Rogers put it, and certainly there was no real proof that, even when mistaken, he had not acted from honest conviction. Macdonnell was not a man of temperate judgement, and the Office could not rely upon receiving an entirely accurate or objective report of conditions in the colony. Moreover, the

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1. C.O.13/118 Daly to Cardwell No.34, 18 July 1866. Encl.
2. Ibid. Minute by Rogers, 1 Oct.1866.

removal of Boothby in 1862 would have been taken as a tacit acceptance of the Legislative Council's view that Judges were not entitled to review colonial legislation. The exercise of the Crown's discretion upon an Address might not be altogether consistent with responsible Government, but it was amply justified at a time when the colonial judiciary was so closely linked with politics.

The wisdom of the decision of 1866 is much more open to question. The Privy Council was in many ways the most satisfactory tribunal for considering the removal of a judge. It could most authoritatively decide the merit of a series of judicial decisions and legal pronouncements. Yet the Colonial Office was better able to estimate the social effects of the presence of a perverse judge in a colony. Daly was not the best correspondent among the Governors, but his increasing anxiety over the confusion caused by Boothby in Colonial affairs was evident. He had come to doubt Boothby's sincerity and good intentions. More easy-going than his predecessor, his opinions might have been carefully considered by the Office in making a decision. Further, the addresses of 1866 were carried unanimously in both Houses, and, although earlier Boothby had often been supported by other judges, he was usually alone in his views between 1864 and 1866.

It was not unreasonable for the legislature to expect the Colonial Secretary to comply with its petition.

But the fault lay more in the manner of the decision than in its substance. The Law Officer's opinion of 1862 had no binding force; nevertheless, the South Australians were entitled under the circumstances to assume that it furnished a guide upon procedure for removing a judge. Rogers was technically correct in declaring that the Queen's "arbitrary discretion" enabled her to choose whether she would exercise it through a judicial tribunal or the executive.[1] But the colonists had received the impression that, subject to expert advice upon legal points, the executive would give an immediate decision. The Privy Council had declared that it ought to be consulted in cases of this sort four years earlier. It was natural that the Colonial Office did not wish to revive the question of removal by communicating this opinion to the Colony at the time. But, when affairs began to assume a grave aspect, the Governor should have been informed that it was at least possible that South Australia would have to submit to the delay and expense of a case before the Judicial Committee. The lack of

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1. C.O.13/117 Daly to Carnarvon No.59, 25 Dec.1866. Minute by Rogers 19 February 1867.

foresight shown by the Office in failing to do this gave the Colonists every excuse for considering that the Imperial Government had not fulfilled the spirit of its obligations.

Rogers found that Carnarvon and Adderley were no more anxious than himself to accept the responsibility of deciding whether Boothby should be removed. The immediate interests of South Australia were therefore sacrificed to the general independence of colonial judges. Rogers gave too little though to the question of how far the activities of Lutwyche and Boothby brought the administration of justice into popular contempt, although he recognised the advantage of having some threat of removal to check an irresponsible judge. But he realised that the legislatures were potentially far more powerful than the Bench, and in the long run he was right in determining that the Imperial Government, so long as it was able to exercise authority, should concentrate upon supporting judicial independence.

Chapter VIII

Later Colonial and International Relations

The circumscribed, "parish pump" outlook of colonial politicians was frequently and justly criticised by the Governors.[1] Nevertheless, between 1854 and 1868, as they developed politically and economically, the colonies showed themselves from time to time very much aware of events beyond their own borders. Victoria's desire for a colonial navy, for example, was the result of the activities of France and Russia, while the Queensland Legislative Council was quite able to see the relevance to its own position of the swamping of the Upper House in New South Wales, and accordingly proposed to alter its constitution.[2] It was natural that the colonists should be much more strongly, although still intermittently, conscious of the influence of their immediate neighbours upon their material interests. In Australia, as we have seen, trade was the chief factor in promoting a measure of inter-colonial co-operation. The political as well as the economic interests of Canada became increasingly involved with those of the other North American colonies and

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1. See for example Martineau, op.cit., p.311. Gladstone Papers 44,319 Gordon to Gladstone January 1864.

2. C.O.234/3 Bowen to Newcastle No.33,8 July 1861.

of the United States, until Federation appeared to offer the only hope of securing harmony between the two Canadas, adequate defence forces, and trade and settlement in the western territories.

Rogers recognised the increasing contacts by suggesting that some powers of extra-territorial jurisdiction should be given to the colonies, notwithstanding the legal difficulties.[1] But the process forced the Colonial Office to define its attitude upon three other points. It had to decide how far the formal approach of one community to another was a purely local affair, and whether greater weight should be given to the views of a group of colonies than to a single one. Finally, the possibility of a federal union was present even in 1854, and the problem of its effect upon relations with the mother-country had to be resolved.

Upon the first of these points the members of the Colonial Office were united. Conferences and correspondence between two colonies were not purely local matters which might be conducted without the intervention of the Governor. Thus Darling received a severe rebuke from Cardwell when he confessed in 1864 that communications between the ministers of Victoria and her neighbours had been carried on without

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1. See above page 270.

his knowledge, his sanction or the use of his name.[1] The Secretary of State declared that the colonists must

> "be careful not to infringe the just prerogative of the Crown"

and the Governor must

> "bring back the administration of affairs in Victoria to that legitimate course from which it appears to have been diverted." 2

The censure was particularly emphatic since Darling had already shown weakness in failing to uphold the Governor's rights over militia affairs and in identifying himself with the agitation over convict transportation to Western Australia. But Cardwell was demanding no more than Victoria's conformity to the general practice in both the North American and Australian groups. The Office recognised that correspondence must be initiated by the responsible ministers. Further, it respected the closeness of social, economic and political ties by allowing direct correspondence: the Governors were not the sole channels of communication. At the same time the constitutional subordination of each colony to the Imperial Government was emphasised by securing and citing the Governors' authority.

The question of convict transportation again provides evidence of the weight given to the opinions pressed by

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1. C.O. 309/68 Darling to Cardwell No.100, 24 Sept. 1864.
2. Ibid. Draft Cardwell to Darling Confidential 19 Dec.1864. (Cardwell's draft.)

several colonies acting together. The Imperial Government had, of course, long realised that the system could not be forced upon a colony against the wishes of its representative legislature. Further, Labouchere had allowed the eastern Australian colonies to protect themselves against the social evil of an influx of holders of conditional pardons.[1] Although they infringed the royal prerogative of mercy, stringent Convicts Prevention Acts were in force in Victoria, New South Wales and South Australia. But in 1862 the appointment of a royal commission upon penal servitude aroused fear of an increasing number of convicts in Western Australia, and the possible creation of new penal settlements. A series of conferences was held during the next two years, and a stream of addresses arrived in the Colonial Office, praying for an immediate end of transportation to the continent.[2] The colonists thus demanded that the Imperial Government must subordinate its policy to their wishes, and, even more, that it must compel Western Australia to submit, despite the views and interests of its settlers.

The Imperial authorities repudiated the idea that responsible government gave the colonists the right to make such a demand, and in 1863 Newcastle announced that the

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1. See above page 301.

2. Many of these may be found printed in P.P. H.C. 1863, Vol.XXXVIII (505) and P.P. H.C. 1864, Vol.XLI [3357].

system would be continued.[1] But opinion in the Office was not entirely unsympathetic. The colonists' request appeared less unreasonable to Elliot when it was shown that convicts from Western Australia had reached Victoria.[2] Rogers and Fortescue brought the Secretary of State to agree that conditional pardons should be abolished.[3] Instead, tickets of leave were to be given, and while holding them convicts must not leave Western Australia.[4] The Home Office also consented to modify the recommendations of the commission by declaring that transportation should continue at the present rate instead of being increased. But the colonists were not satisfied, since time-expired or escaped convicts might still come to compose a large part of the population. A plan to retaliate upon Great Britain by conveying time-expired men to her shores was abandoned, but Victoria seemed to have some hope of inducing other colonies to join her in severing communications with Western Australia.[5]

In the meantime Cardwell had entered the Colonial Office to find that Elliot and Fortescue held much stronger

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1. Hansard, 3rd Series, Vol.CLXIX, col.679 (27 Feb.1863).

2. C.O.309/63 Barkly to Newcastle No.27, 23 April 1863: Minute by Elliot 19 June 1863.

3. Ibid. Minutes by Rogers, Fortescue and Newcastle.

4. Hansard, Vol.CLXXIII, cols.723-786 (Feb.18 1864).

5. C.O.309/67 Darling to Newcastle Confidential 25 May 1864 and C.O.13/115 Daly to Cardwell Confidential 26 Sept.1864.

views than they had in 1863. The assistant undersecretary thought that Great Britain in offering only limited concessions "is on the wrong tack" and must soon reverse it.[1] Fortescue "heartily wished" that transportation was at an end.[2] These opinions undoubtedly influenced Cardwell when he made his decision that after three years had elapsed no more convicts should be sent to Western Australia.[3] Although the colonists grumbled at the delay,[4] they had in fact won a very considerable victory. At this time there was a great deal of anxiety in Great Britain over the disposal of convicts, and much greater benefits than were actually possible were expected from sending them overseas after a period of penal servitude. Although they had agreed upon little else, the Commissioners were unanimous except for Childers upon this point. But the wishes of responsibly governed colonies were now held to be important enough for most speakers in Parliament to agree with Pakington's observation:

> ".... no value from transportation to Western Australia would compensate for a quarrel with Victoria and New South Wales." 5

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1. C.O.309/67. Darling to Cardwell No.55, 16 June 1864. Minute by Elliot 23 August 1864.

2. Ibid. Minute by Fortescue.

3. C.O.309/67 Darling to Cardwell No.89, 25 August 1864. Minute by Cardwell (undated). Hansard, 3rd Series, Vol.CLXXVII, col.137 (16 Feb.1865). In fact, transportation continued until 1870.

4. C.O.13/117 Daly to Cardwell Confidential 26 Jan. 1865.

5. Hansard, 3rd Series, Vol.CLXXII, col.771.

This success gained by concerted action appears to be counter-balanced by the repeated refusal of the requests of Canada, Nova Scotia and New Brunswick for financial help in building an inter colonial railway. Certainly even the most emphatic colonial unanimity could not have induced the Imperial Government to modify its general financial policy enough to make a grant of half the interest upon a loan of £3,000,000, as the North American delegates proposed in 1857 and 1858. In other ways, however, it was prepared to assist the project. Imperial guarantees of interest were scarcely more popular with the House of Commons than direct grants of money. Yet the Government was very willing to give one for this purpose if satisfactory arrangements could be made. Newcastle in 1861 tried to further the railway in discussions with London financial interests.[1] The negotiations in the following year broke down over the refusal of the Canadian delegates to agree to provide for a sinking fund. But it was clear from the outset that the Chancellor of the Exchequer intended to enforce this essential condition of an Imperial guarantee,[2] and, according to Newcastle, Sicotte

> "at last avowed himself satisfied with everything except the name of a sinking fund, for he admitted that all real objections to that point even were removed by the admission of the money being invested in colonial securities."[3]

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1. R.G. Trotter, Canadian Federation, p.184.
2. Gladstone Papers. 44,263. Gladstone to Newcastle 27 Nov. 1863.
3. C.O.42/636 Sicotte and Howland to Newcastle 23 Dec.1862. Minute by Newcastle 14 Jan.1863.

The Canadian delegates did not ask for another interview to see if their further objections could be removed by negotiation, but departed for Paris after repudiating in a letter the conditions they had assented to verbally. But wrathful as he was at both the tone and the contents, Newcastle was determined that

> "Canada must not be made to suffer for the offences of two unfaithful servants." [1]

Later failures before the loan for the railway was guaranteed as a part of the plan for confederation were chiefly a result of colonial disunity. It was plain that short of making a direct grant or abandoning the sinking fund, without which Parliament's assent could hardly have been obtained, the British Government had made every effort to meet the wishes of the group of colonies.

In the same way, the Colonial Office refusal to allow the Australian colonies to grant trade preferences to one another does not really prove that the wishes of several colonies received no greater respect than the wishes of one.[2] In 1866 only New South Wales and Tasmania showed any enthusiasm, while the attitude of the Office and Rogers' argument that the "most favoured nation" clause in treaties should not apply to neighbouring colonies showed that a vigorous movement in Australia would not be resisted for

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1. Ibid.
2. See above pages 256-7.

long. Again, Lytton was very reluctant to inform the Maritime colonies that the Office would take no action upon the Canadian proposal of federation in 1858 unless they should also request it.[1] He was afraid that the information would suggest concerted action which he could not resist.

These examples give some idea of the status which the members of the Colonial Office would accord to a federation. They were not likely to pay less deference to the colonies when they were linked by a political bond. Indeed, Newcastle was not anxious to foster union in Australia in case its strength should bring independence.[2] But Dr. Whitelaw is not quite correct in saying that in the fifties the Office encouraged a federal movement in North America while opposing a similar one in Australia.[3] It is true that in 1857 Labouchere refused a request to establish federal institutions for Australia by Act of Parliament.[4] But the proposal was not sponsored by any active politicians in the colonies or by the Governors. It emanated from a meeting in London, which was presided over by Wentworth - a representative of a class largely deprived of power by the new constitutions.

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1. Memorandum for the Cabinet Nov. 10 1858 by Lytton. Printed in C.H.R. Vol.XV, 1933, R.G. Trotter, British Government and Proposal for Federation of 1858.

2. See above p.63.

3. W.M. Whitelaw, Canada and the Maritimes before Confederation, p.121.

4. C.O.201/500 Memorial from General Assdciation for the Australian Colonies. Registered 12 May 1857. Minute by Labouchere 11 May 1857. Draft Merivale to Wentworth 16 May 1857.

A draft bill showed that the act was not to be merely permissive. It was obviously impossible to impose such a scheme upon responsibly-governed colonies. Labouchere's answer was perhaps sharper in tone than usual, since he followed the wording of a memorandum written by Robert Lowe, then at the Board of Trade.[1] But his course did not necessarily imply any hostility towards Australian federation. Among his colleagues, Merivale was a convinced federalist. Contrasting circumstances in North America and in Australia, he remarked

> ".. in the former the impulse towards federation is merely political - in the latter the need for it is social and economic."[2]

Imperial intervention would therefore be particularly out of place. The progress of social and economic development in the colonies would give rise to the movement. This was also Rogers' view. He thought that the co-operation established by conferences would gradually develop into federal institutions, but that

> "the function of the Imperial Government is simply to remove difficulties and express friendly feeling."[3]

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1. C.O.201/500 Memorial from General Association for the Australian colonies. Memorandum by Lowe 8 May 1857.

2. C.O.188/124 Manners-Sutton to Russell Private and Confidential 20 April 1856. Minute by Merivale 10 May 1856.

3. C.O.13/111 Daly to Newcastle No.18, 24 April 1863. Minute by Rogers.

There seems to be very little difference between this opinion and Labouchere's view upon North American federation in 1857. It was

> "....not... a thing to be urged from this side, but .. we ought to be prepared for it and rather encourage it than otherwise."[1]

The essential recognition that the suggestion must originate among the colonists is here. But it is possible that the Secretary of State was contemplating it as the lesser of two evils. In the fifties the question was always presented to the Office in its most unattractive light, even by Governor Head whom Labouchere had consulted at length before recording his verdict. It is true that Head gave his reasons for hoping that one day the North American colonies would join in a federal or legislative union.[2] This union - physically powerful, prosperous and firm in the traditions of constitutional government - would be able to stand alone and resist incorporation into the United States even if ultimately separated from the mother country. But in 1856 he did not consider that federation was possible at the moment. The only reason for an immediate attempt to overcome the absence of communications and common interests and sentiments would be the imminent dissolution of the union

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1. C.O.42/614 Head to Lytton 16 August 1858. Minute by Merivale.

2. The surviving material concerning Head's views is analysed in D.G.G. Kerr, unpublished thesis, The Work of Sir Edmund Head in North America, Chapter IX, sections ii and iv.

between the Canadas. Even an imperfect federation would be better than this, since if Upper Canada were cut off from the Maritimes and the sea, she would inevitably drift towards the United States. He implied that any proposal for federation which he supported in thenear future would mean that he had decided to sacrifice the Maritimes in order to solve Canada's constitutional problems.

This aspect most impressed the Lieutenant-Governors of Nova Scotia and New Brunswick. In dispatches to the Colonial Office they both attacked a scheme which they felt must perpetually subordinate the interests of the smaller colonies to Canada. Further they both opposed the whole conception. Mulgrave was almost certain that federal institutions would prove unworkable.[1] Struggles between the central and local governments and between the various sectional interests would result in deadlock. A legislative union was not possible, because one government could not administer such a wide area deficient in institutions for municipal and local government. But the worst prospect would appear if, after all, the system proved adequate. Such a powerful state would not remain subject to Great Britain. Manners-Sutton also feared either a weak or a strong central government.[2] In the former case, the provinces

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1. C.O.217/221 Mulgrave to Lytton Confidential 30 Dec.1858.

2. C.O.188/131 Manners-Sutton to Lytton Private and Confidential 2 Oct.1858.

would keep most powers in their own hands, while the Federal Government, not content to be idle, would encroach upon functions belonging to the Imperial Government. On the other hand, the provinces would be so discontented if their powers were engrossed by the central institutions that they would look to the United States in the hope of regaining their local independence.

These opinions with their emphasis upon Canada's selfish motives help to account for the lack of enthusiasm evoked by Galt's federation proposal when he visited London in 1858 and 1859. Lytton was so much opposed to it that it was not easy to persuade him not to publish his opinion.[1] His attitude was probably coloured to some degree by the action of the ministers without official sanction upon a subject of Imperial interest. Despite his interest in the settlement of the Hudson Bay Company's territory, he was unmoved when Head pointed out that a general government would have resources for effective expansion westwards.[2] He did not seem to be afraid that federation would lead to independence, and thought this part of Mulgrave's argument faulty.[3] But he regarded the proposal as a purely party move, involved

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1. Skelton, Life of A.T. Galt, p.252.

2. C.O.42/613 Head to Lytton Confidential 8 September 1858.

3. C.O.217/221 Mulgrave to Lytton Confidential 30 December 1858. Minute by Lytton 14 Jan. 1859.

in bitterness and controversy.[1] His decision not to give any support was therefore natural, especially in the absence of any favourable voice from the Maritimes and the apparently successful issue of the controversy over Ottawa. He found that in the Office Elliot who was impressed by Manners-Sutton's argument and Blackwood fully agreed with him.

The two permanent officials went further, and commended the plan of a legislative union of the Maritime Provinces which had been put forward from time to time by Head and now by Manners-Sutton.[2] In Newcastle's secretaryship this project was consistently approved and privately encouraged by the Office. The members and the Lieutenant Governors hoped that it would remedy the evils of parliamentary government in small colonies - ministerial extravagance, the dearth of ability and the domination of political life by personal issues. But upon the other, equally important object, they were sharply divided. Manners-Sutton, Mulgrave, Gordon and Macdonnell believed that maritime union would prevent a union with Canada. On the other hand, Merivale by implication and Newcastle emphatically agreed with Head that it would be a step towards a general federation.[3] It would remove the

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1. Lytton's memorandum for the Cabinet 10 Nov.1858. Printed C.H.R. Vol.XV, Sept.1933. Trotter, op.cit.

2. C.O.188/131 Manners-Sutton to Lytton Confidential 2 Oct.1858. Minutes by Blackwood 20 Oct.1858 and Elliot 25 Oct.1858. Elliot's memorandum for the Cabinet printed in C.H.R. Vol.XV, Sept.1933, Trotter, op.cit.

3. C.O.188/132 Manners-Sutton to Newcastle Private and Confidential 29 September 1859. Minutes by Merivale 21 Oct.1859 and Newcastle 22 Oct.1859.

fear of the three weak provinces being swamped by Canada. Newcastle's visit to North America confirmed his attitude. He returned very much aware of the possibilities of settlement in the west, of the isolation of the Maritimes and of the need to develop communications. This wider view did not make him an advocate of immediate federation. He thought it

> "may be hastened by the present condition of the neighbouring Country, but I do not expect success to any project without first settling (if not accomplishing) the smaller Union and the Railway." 1

But he was determined to foster both in the hope of achieving the larger plan.

It is possible that the journey also made him realise that one great difficulty was suspicion of Imperial interference. Howes' resolution upon federation and maritime union was declared to be too general to justify any announcement of Imperial policy, but the Secretary of State promised to "enter heartily" into the discussion of more precise terms embodied in addresses from the legislatures.[2] But it was important that the provision requiring the prior consent of the Colonial Office to those terms should have been deliberately left out. It was possible two years later to interpret this dispatch as a general licence to initiate and conclude inter-colonial discussions. Earlier both Newcastle and

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1. C.O.217/230 Mulgrave to Newcastle No.47, 21 May 1862. Minute by Newcastle 22 June 1862.

2. Ibid. Draft Newcastle to Mulgrave No.182, 6 July 1862.

Lytton had required future conferences and instructions given to delegates to be authorised by the Secretary of State. Carnarvon had determined that the Office should be the channel of communication between the Governor of Canada and the Lieutenant Governors upon this question, notwithstanding the duplication involved. In 1862 Newcastle removed an occasion for delay and hesitancy, and acknowledged that Imperial interest in inter-colonial relations was limited to their final definition.[1]

There can be no doubt the question of defence prompted Cardwell to support the cause of federation so vigorously. After the Quebec Conference, as Dr. Whitlaw points out, certain factors helped to ensure Colonial Office approval - Monck's dispatch, the visits of George Brown and Colonel Jervois and the impression that there was more unanimity of feeling behind the resolutions than was in fact the case.[2] But comparatively little seems to have depended upon these last-minute events. Before the conference adjourned Cardwell told Gordon that Monck was sure that a strong central government would emerge and hinted broadly that he would soon be instructed to put a policy of federation into force in

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1. Although the Lieutenant-Governors kept the Office informed about the preliminaries to the conferences. Monck was as usual criticised for being too casual. (C.O.42/642 Monck to Cardwell No.124, 26 Aug.1864. Minute by Blackwood 10 Sept.1864).

2. Whitelaw, op.cit., pp.271-276.

New Brunswick.[1] It is not by any means certain that a strong central government was necessary to gain the support of the Office. Early in October Fortescue lamented that a weak one seemed probable and suggested sending information to the Governors about the provincial system in New Zealand, showing

> "the evils ..... and at the same time the large amount of success which has followed even the present imperfect system." [2]

He implied that the Home Government was already committed to sponsor any kind of federation which might appear. The truth seems to be that the Office was prepared to give full support to Canada once she received any favourable response from the smaller colonies. Thus no official instructions were ever given to the Lieutenant Governors concerning Maritime union, in case it should "give offence to Canada".[3] Elliot was quite ready to help Canada to achieve her aim through commercial ties, much as he disliked the policy of federation.[4] Just as the Office felt that it was fruitless to resist the wishes of a responsibly-governed colony in purely internal affairs, so resistance to the strongest of a group was to be avoided wherever possible. Cardwell's

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1. Whitelaw, op.cit., pp.271-276.
2. Cardwell Papers P.R.O. 30/48/39 Cardwell to Gordon 1 Oct. and 14 Oct. 1864. See also Cardwell to Gordon 22 Nov.1864.
3. C.O.188/141. Gordon to Cardwell Confidential 26 Sept.1864. Minute by Fortescue 13 Oct.1864.
4. C.O.188/138 Gordon to Newcastle Confidential 6 July 1863. Minute by Blackwood 21 July 1863.

interest in defence gave qualities of determination and ruthlessness to a course which he would have pursued in any event.

This course involved disregarding public opinion in Nova Scotia and the verdict of a general election in New Brunswick. The Lieutenant Governors found themselves in a difficult position, since they had to abandon a plan which they had been pressing with the fullest unofficial approval of the Colonial Office, and had to recommend another which they were known to dislike. But Cardwell did not think it necessary to accept Gordon's rather tentative offer of resignation when the decision of the Imperial Government was announced.[1] He did not believe that the Lieutenant Governors should find any difficulty in concealing their private opinions and regarding themselves simply as instruments of the Imperial authority. Macdonnell was not altogether successful, and was transferred to Hongkong in the summer of 1865, although this was not quite such a direct measure of punishment as it is often supposed to be. The post was first offered to Gordon, then, when he declined it, to Macdonnell.[2] The latter was not, however, allowed to withdraw his acceptance.

In the meantime, Gordon's actions differed little from

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1. Cardwell Papers P.R.O. 30/48/39 Gordon to Cardwell 5 Dec.1864, 2 Jan. and 8 Feb. 1865. Cardwell to Gordon 1 Jan.1865, 21 Jan.1865 and 4 March 1865.

2. Cardwell Papers P.R.O.30/48/39 Gordon to Cardwell 22 May 1865 and 28 August 1865. Cardwell to Gordon 8 July and 30 August 1865.

those of a governor of the period before 1850. He was constantly engaged in trying to impose Imperial policy upon his ministers, and to secure the appointment to the Executive Council of men who would be willing to carry it out.[1] Members of the opposition, especially Tilley, received far more of his confidence than his ministry. Gordon himself was not at all concerned with the incongruity of his behaviour with the principles of responsible government. Yet his determination to secure a ministry favourable to confederation involved taking no account of popular views upon purely domestic subjects as well as upon the question of Imperial interest. The members of the Colonial Office showed that their regard for the constitutional rights of a small colony was equally limited. Elliot and Blackwood, originally opposed to federation, approved the Lieutenant Governor's tactics as fully as the other members. But they did realise that Gordon could hardly remain after he had replied to an address from the Legislative Council without advice, and his ministers had resigned.[2] Although his activities were well known, he had not hitherto stood openly convicted of prejudice against one party. In his turn he found himself compelled to accept

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1. See for example C.O.188/143 Gordon to Cardwell confidential 22 May 1865. C.O.188/145 Gordon to Cardwell confidential 12 February 1866.

2. C.O. 188/145. Gordon to Cardwell No.24, 15 April 1866. Minute by Blackwood 8 May 1866. Ibid. No.30, 23 April 1866. Minutes by Cardwell and Rogers.

an appointment to Trinidad, already designed for him.[1] There was, however, one aspect of this treatment of New Brunswick which pointed forward to equality between the mothercountry and a colony. The Imperial Government and the Canadian entered into a kind of partnership to secure the consent of the province. While one supplied constitutional pressure, the other supplied what Tilley called "the needful".[2]

This harmony was threatened by Carnarvon when he became Secretary of State in June 1866. He was anxious, as indeed Cardwell had been, to secure an Imperial act for the confederation of Canada before the end of the session. As a member of a minority government holding office as a result of a temporary alliance with the "Adullamite" liberals, he very naturally consulted his predecessor in the hope of preventing opposition to the measure in Parliament. But he took the curious step of trying to make members of the Opposition commit themselves to its provisions before his colleagues had consented to them.[3] This engendered some distrust, which was not lessened by the fact that Carnarvon intended the bill to authorise the settling of many details later by Order-in-Council.

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1. Gladstone Papers 44, 320 Gordon to Gladstone Confidential 26 March 1866. Encl. Cardwell to Gordon 8 March 1866.

2. C.H.R. Vol.XIII. G.E. Wilson, New Brunswick's Entrance into Confederation, p.5. Rep. of Canadian Historical Assocn. 1927. Chester Martin, British Policy in Canadian Confederation, pp.20-28.

3. Cardwell Papers, P.R.O.30/48/40 Carnarvon to Cardwell 14 July 1866 and 16 July and 20 July 1866. Cardwell to Carnarvon 14 July 1866, 8 July 1866.

Further, his plan said nothing of the Imperial guarantees for loans for an Intercolonial railway, for buying out the Hudson's Bay Company and for fortifications - essential factors in gaining support in North America.[1] It was probably well that the negotiations broke down, and that the arrival of the Canadian delegates was delayed on account of the alarm over Fenian designs. It was not easy to secure Disraeli's sanction for the guarantees.[2] The colonists would almost certainly have been unwilling to allow a large part of their constitution to rest upon an Order-in-Council, an executive instrument, rather than upon statute. Although Carnarvon assured Cardwell that he intended the terms of the Order to be based upon full agreement of the delegates, he proposed to give them only twenty-four hours to accept or to reject his plan. It is true that this was very much the tone which Cardwell had used towards the Maritimes individually. But it would have been most unwise to have employed it towards a joint British North American delegation.

The close interest of the Colonial Office in the change in political relationship between the colonies had no counterpart where more normal contacts or even disputes between colonies were concerned. In Australia agreements over commerce

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1. Ibid. Memorandum by Cardwell attached to Carnarvon to Cardwell 20 July 1866. Russell to Cardwell 20 July and 25 July 1866.

2. Hardinge, op.cit., Vol.I p.304. Hughenden Papers, Carnarvon to Disraeli, Private, 7 February 1867.

were merely given general encouragement, and the Office did not intervene until Imperial commercial policy was affected. Intercolonial conferences passed almost unremarked except when the transportation question involved Imperial interest. The Office made every effort to place inter-colonial boundaries, a subject of frequent dispute, within the category of purely local affairs.

This was impossible at the outset, since the Act of 1850 had provided that upon petition of the inhabitants the northern district of New South Wales, Moreton Bay, should become a separate colony.[1] Lord Grey had sponsored the clause in the hope that the squatters would ask for convict labour.[2] In the Office Merivale had made the original suggestion.[3] He always believed that the apparent impossibility of setting up municipal institutions made separate governments essential for parts of the colonies distant from the capitals. This did not in reality conflict with his hope of ultimate federation. He must have expected that social and economic progress would break down these new political barriers as it would the older. He attributed the hostility between New South Wales and Victoria to the delay in separating them, not to the separation itself. He was obviously displeased at Denison's advice against

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1. 13 & 14 Vic. cap.59 s.34.
2. Melbourne, op.cit., p.372.
3. Ibid. p.273.

making Moreton Bay into a colony, although he counselled acceptance for the moment.[1] Within a year petitions from the northern districts and the persistence of Marsh, M.P. for Salisbury, and other representatives of the squatters in England caused Labouchere to reverse the decision. But the definition of the boundary led to prolonged correspondence before the Office agreed with Denison that the valuable Clarence and Richmond River districts should remain in New South Wales.[2] By the time Queensland came into existence late in 1859 it was clear that the questions of this kind not only involved much work for the Office, but laid it open to pressure from absentee colonists, which was much resented in Australia. Further, they placed the Governor in a difficult position. He was acting as an Imperial officer when advising the Colonial Office upon the matter, but he could scarcely avoid being swayed by his Council upon a subject of such vital local interest. Although acts of Parliament were still needed to fix the boundaries of South Australia, these considerations influenced the members of the Colonial Office, even more than Merivale's departure, in their refusal to entertain further petitions for separation. It was pointed out

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1. C.O.201/487 Denison to Labouchere No.168, 18 October 1855. Minute by Merivale 28 January 1856.

2. C.O.201/498 Denison to Labouchere No.25, 8 Feb.1857. Minute by Merivale 17 Apl.1857. Ibid. No.42, 27 Feb.1857. Minute by Eall 18 May 1857. C.O.201/501 Marsh and Deputation to Labouchere 27 May 1857. Minute by Fortescue 16 June 1857.

that the districts complaining of neglect could instruct their representatives to bring their grievances before the legislature: they must rely upon maturing public opinion, not upon the Imperial government, to secure redress.[1] In the same way, the Office declined to interfere in the dispute between New South Wales and Queensland upon the division of the public debt of the original colony.[2] When a quarrel between Victoria and New South Wales over the possession of an island in the River Murray was referred to the Imperial Government, even Buckingham would not take a direct part, but suggested that both colonies should petition the judicial committee of the Privy Council.[3]

In assuming this attitude the Colonial Office admitted that it had neither the local knowledge nor the power to enforce its decisions which would justify it in acting as an arbitor between responsibly-governed colonies. If federation had become an immediate and serious question in Australia during this period, it is possible that its direction and decision might in the same way have been left entirely in colonial hands. But Newcastle's views make this

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1. See for example C.O.201/542. Young to Carnarvon No.15, 20 Feb. 1867. Minutes by Cox 18 April 1867 and Rogers (undated).

2. C.O.234/4 Bowen to Newcastle No.45, 21 Aug. 1861. Minute by Rogers 30 Nov. 1861. Draft Newcastle to Bowen No.63, 26 Dec. 1861.

3. C.O.201/539 Young to Carnarvon 21 Dec. 1866. Minutes by Cox 4 March 1867, Rogers 8 March 1867, Holland 13 March 1867 and Buckingham 11 and 13 March 1867.

far from certain. Moreover, it must be remembered that in encouraging maritime union the Office was partly moved by the purely local consideration of improving the tone of public life. It had not hesitated to interfere indirectly through the influence of the Governors upon the question of federation in North America. Although the Imperial Government insisted upon only one substantial modification in the colonial proposals for union,[1] responsible government clearly meant less in relation to plans for federation than in other intercolonial affairs. It meant only that the project must be initiated and finally ratified by the colonial legislatures.

Discussion of the international relations of the responsibly-governed colonies cannot form more than a post-script to these considerations. Their contacts with foreign countries were slight. More important, foreign policy was considered too vital a question for any of its aspects to be freed from the control of the Foreign Office. It was to be the last subject in which the dominions obtained full autonomy. Thus the authority of the Foreign Office was insisted upon in even the slightest and most formal contacts with representatives of another power. It might seem almost absurd for the Governor General of Canada and the Governor

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1. Concerning the delegation of the prerogative of pardon.

of New South Wales to receive severe reprimands for omitting the word "provisionally" in announcing their issue of exequators to consuls.[1] But vigilance was not entirely unnecessary. On one hand, colonial freedom in other matters was sometimes misleading. A French consul tried to enter into direct relationship with the Canadian government in 1860 in order to have his quite unjustified pretensions recognised.[2] On the other, the colonists themselves were not always ready to conform to the restrictions imposed by Imperial authority. The Canadian trade delegation to the West Indies in 1866 tried to ignore both Imperial diplomatic representatives and the Imperial ban upon differential duties.[3] This defiance was the more marked since it had been made very clear that an informal part in negotiations was the limit of the concessions which the Foreign Office would make to colonial feeling. A petition of 1856 from New Brunswick for the appointment of a colonist to look after British North American interests in the United States was firmly refused.[4] It was

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1. C.O.42/628 Monck to Newcastle 16 Dec.1861. Draft Newcastle to Monck 4 Jan.1862. C.O.201/494 Denison to Labouchere No.76, 8 May 1856. Draft Labouchere to Denison No.101, 26 August 1856.

2. C.O.42/624 Hammond to C.O. 12 May 1860. Encl. Opinion of Queen's Advocate 5 May 1860. Ibid. Woodhouse to Rogers 3 June 1860. Minutes by Elliot 3 July 1860, and Fortescue 6 July 1860.

3. C.O.42/660 Hammond to C.O. 5 April 1866. Encl. Thornton to Clarendon 10 March 1866. Ibid. Layard to C.O. 3 May 1866. Encl. Thornton to Clarendon 6 April 1866.

4. C.O.188/124 Manners-Sutton to Russell No.35, 18 April 1835. Draft Russell to Manners-Sutton No.5, 23 May 1855. C.O.42/597 Head to Russell No.38, 27 April 1855. Draft Russell to Head No.19, 25 May 1855.

emphasised that this function belonged to the British Ambassador.

The members of the Colonial Office were in full agreement with the Foreign Office. They had no wish even to extend the practice of allowing the colonists to conduct informal discussions. When the renewal of the Reciprocity Treaty was being considered, Elliot thought that it would be well to appoint commissioners from the North American provinces.[1] But Fortescue and Cardwell were in favour of leaving negotiations entirely in the hands of Lord Lyons.[2] The members were also content that the smaller colonies should receive much less consideration than Canada. They felt that the latter's proposal not to allow Americans to enjoy rights of fishing without licence after the abrogation of the Reciprocity Treaty must be accepted, although the Imperial Government would have liked to permit continued free access for a time.[3] But Manners-Sutton was urged to do everything in his power to secure acceptance of the Treaty, despite New Brunswick's objection.[4] There is no evidence that

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1. C.O.42/645 Layard to Rogers 9 May 1864. Minute by Elliot 11 May 1864.

2. Ibid. Minutes by Fortescue 12 May 1864 and Cardwell 14 May 1864.

3. C.O.42/654 Monck to Cardwell Confidential 31 March 1866. Draft Cardwell to Monck, Confidential 21 April 1866. Ibid. Michel to Cardwell 19 Feb.1866. Draft Cardwell to Monck Confidential 3 March 1866.

4. C.O.188/122 Draft Grey to Manners-Sutton Confidential 21 Sept. 1854 and 2 Oct. 1854.

Merivale objected to any of the terms of the Anglo-French convention which caused such an outcry in Newfoundland that it had to be abandoned.[1] It is true that upon this occasion Labouchere declared that no agreement infringing her maritime and territorial rights would be concluded without the consent of the legislature.[2] Yet when Newfoundland's attitude prevented the ratification of the convention of 1860 Rogers believed that

> "H.M.G. must claim the right of interpreting freely the pledge given by its predecessors."[3]

At the same time, the permanent under-secretary, Fortescue and Newcastle were sharply critical when Governor Bannerman dismissed the Kent ministry, although they knew that the new Executive Council would probably prove much less obstructive.[4] The benefit to Imperial interest did not justify the breach of a Governor's constitutional position. Rogers was, however, looking ahead much farther than he

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1. See the correspondence on the negotiations, in which Merivale represented the Colonial Office, in F.O.27/1321 and F.O.27/1322.

2. C.O.194/150 Darling to Labouchere No.8, 7 Feb. 1857 Draft Labouchere to Darling 26 March 1857.

3. C.O.194/165 Bannerman to Newcastle No.11, 31 Jan.1861. Minute by Rogers 24 Feb.1861 See also minutes by Blackwood (22 Jan.1861) Rogers (29 Jan.1861) on Bannerman to Newcastle No.1, 1 Jan.1861.

4. Ibid. No.20, 14 March 1861. Minutes by Rogers, Fortescue and Newcastle. Draft Newcastle to Bannerman No.92, 3 May 1861. Their opinions grew more favourable when the action proved successful.

realised when he anticipated the helplessness of the Imperial government if a colony should "set us at a defiance" in foreign affairs.[1]

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1. C.O.309/65 Hammond to Rogers 14 May 1863. Minute by Rogers.

CONCLUSION

The issues which we have been considering are representative of those before the Colonial Office between 1854 and 1868. From them it is clear that the members were content to leave the initiative in the hands of the colonists. No instructions were issued except as a result of an action in one of the colonies, and no attempt was made to impose a uniform policy upon them. When Molesworth and Russell gave a general command that tariffs must conform to free trade principles, they were not in reality departing from this practice. They were reiterating a policy laid down in the previous decade which Canada and the West Indies were proposing to violate. Rogers, indeed, proposed to make an exception in his draft bill of 1863-4 and to require uniformity in matters of procedure. Although Lytton declared that any suggestions concerning federation must be initiated by the Imperial Government, he was very well aware that the question must first be raised in North America. Labouchere had instructed Head to investigate and report upon the subject. This was the farthest extent of Imperial initiative before Cardwell instructed the Lieutenant Governors of the Maritimes and the Governor of

Newfoundland to impose union upon the unwilling inhabitants. Even here the opportunity was provided by the Canadian, not the Imperial, Government.

It was significant that both Cardwell's action and the most substantial clause of Rogers' draft bill, giving the Governor the sole power of appointing militia officers, should have been connected with defence. This was the subject of paramount Imperial interest, the one real exception to the general attitude of the Home Government. It led Newcastle in 1862 to propose unsuccessfully that the militia forces of Canada and the Maritimes should be united under the Governor-General pending a fuller union.[1] The policy of reducing colonial troops was kept steadily in view. But selfgovernment was acknowledged by a certain amount of deference to colonial opinion: the strength of garrisons and the amount of payment were related to the dangers and material resources of each colony, notwithstanding the growing opposition of the Commons. Almost at the end of the period Carnarvon sent troops to Canada to meet the Fenian menace, although he felt bound to explain and excuse

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1. Whitelaw, op.cit., pp.180-2. The constitutional obstacles were not quite so great as Dr. Whitelaw states. The difficulty lay in the probable reluctance of the legislatures to vote money for such a force.

himself at length to the Chancellor of the Exchequer.[1] In the same tradition, Rogers proposed to leave a small garrison in New Zealand in 1869. It was Lord Granville who insisted that colonial circumstances could not hinder Imperial policy.[2]

The Imperial Government did not only initiate defence policy, but held that the local aspects of the subject were not of purely colonial interest. The subordination of the militia to the officer in command of the troops in time of war was maintained. Although the Governor's right over the appointment of militia officers was abandoned in New South Wales, Victoria and New Zealand, his position as head of the force was not denied. The Colonial Office did not hesitate to comment frankly and unfavourably upon militia affairs in Canada and New Zealand. The necessity for the Queen's Representative to authorise and to take an active part in correspondence between ministers and officers of the Imperial garrison was upheld, since Cardwell and the War Office took a somewhat less liberal view of this matter than Rogers.[3]

On the other hand, the question of defence probably

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1. Hughenden Papers Carnarvon to Disraeli 27 and 30 August 1866.

2. C.O.209/210 Bowen to Granville 17 March 1869. Minutes by Rogers and Granville.

3. C.O.309/66 Darling to Newcastle No.41, 23 April 1864. Minutes by Rogers 1 July 1864 and Fortescue 20 July 1864 Draft Cardwell to Darling 22 Aug.1864.

did more than any other to foster the development of the responsibly-governed colonies. It could scarcely have been foretold in 1868 that the withdrawal of the garrisons would be completed so abruptly and so ungraciously as it proved to be. But it was obvious that sooner or later the regulations upon militia affairs and military correspondence would become merely nominal, and local policy could no longer be influenced by threats of reduction. Local initiative was always encouraged. Victoria's action upon naval defence was so warmly approved that Carnarvon and even Adderley condoned her failure to bear as much of the cost as they had hoped.[1] There was, moreover, real substance in the contention that colonial autonomy must be incomplete until the colonists took the duty of military defence upon themselves, although in the Colonial Office only Adderley placed this above the need for Imperial economy. Certainly a partnership could not evolve while the British parliament and people resented so bitterly the burden thrust upon them.

In other directions also by 1868 the colonists had gained rather more freedom than was immediately apparent. The position of the Governor as an Imperial instrument to

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1. Hughenden Papers. Carnarvon to Disraeli 19 October 1866. Adderley, Review of the Colonial Policy of Lord John Russell's Administration, p.114.

carry out Imperial policy had recently been emphasised in New Zealand and the Maritimes. He continued to profess a discretion in local affairs, as the Colonial Office attitude to the Victorian crisis had clearly shown. This tended to obscure the many aspects of the discretion which had been abandoned. Moreover, except in the case of Darling, the members of the Office were not prepared to uphold a right which the Governor did not feel able to enforce. In the same way the continued Imperial review of laws did not allow the tendency of the Office to dissociate itself from their content to be altogether plain. Colonial independence had been fully and openly recognised in only two important respects in these years - in commercial policy and the government of native peoples. But the Imperial government was gradually laying claim to less and less authority in almost every sphere.

But the empirical methods of the Colonial Office made it very often regulate its attitude according to the size and importance of a colony, rather than according to the subject with which it was concerned. This stands out most clearly in the special consideration shown to Canada. This was scarcely a constitutional standpoint where a conflict of interest with the Maritimes was involved. But in the long run the self governing colonies gained rather than lost, since concessions made to Canada such as the regulation of

tariffs were extended to all the others.

The Colonial Office was not always consistent in other ways. The constitutional crises in Victoria showed it shortsighted, and very slow to appreciate the consequences of its course. But they served to reveal how wise its general policy of refraining to interfere in the domestic upheavals of the colonies was, although at times it seemed to be both weak and indifferent. On the whole the members showed themselves able to appreciate the increasing selfconsciousness of the colonies. One of their greatest failures was their inability to realise the strength of the feelings of loyalty and affection which still existed.

The views and opinions of Merivale and Rogers stand out most prominently in this survey. But Higinbotham's contention that Rogers ruled the colonies is not proved. The parliamentary members of the Office nearly always took the advice of the permanent members upon legal or technical matters, and occasionally on political affairs deferred to their experience. Otherwise, agreement between them appeared to be based upon a genuine similarity of outlook. There are enough examples of Secretaries of State acting against advice to show that they were by no means nonentities. In the same way, neither Rogers nor Merivale nor Elliot hesitated to express opinions they knew to be opposed to those of their superiors. Elliot sometimes adopted a tone

of almost exaggerated deference, but he contended firmly, for example, that plans for the settlement of the western territories of North America were visionary and premature despite the hopes of Lytton and Newcastle. The permanent officials, especially Rogers, exercised the most consistent influence. But the final attitude of the Colonial Office was the result of the interaction of the views of permanent and Parliamentary members, not of the domination of one by the other.

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